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Page	*Line*	
211	4 and 2 from bottom	transpose " plaintiffs " and " defendants."
390	22	*Brigg* v. *Thornton*. In this case *Neville*, *K.C.*, and *F. M. Preston* appeared for the appellants, Messrs. Thornton, and *Neville*, *K.C.*, and *Harold Mather* for the appellants, C. J. Grant & Son.
420		*In re Hanbury*. *L. W. Byrne* appeared for the executor on the appeal.
634	10 and 9 from bottom	*dele* the words " and agreed to."
684		*Attorney-General* v. *Corporation of Nottingham*. The Solicitors for the defendants were *Sharpe, Parker & Co.*, for *Sir Samuel Johnson*, Town Clerk of Nottingham.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re SIMPSON.
SIMPSON *v.* SIMPSON.

C. A. 1903 Nov. 9, 10.

[1902 S. 4266.]

Husband and Wife—Marriage Settlement—Covenant to settle After-acquired Property—Scots Domicil—Scots Law—Jus Relictæ—Spes Successionis—Covenant of Indemnity—"Entitled to any Personal Property for any Estate or Interest whatsoever."

A wife's mere spes successionis, such as her hope of succession to a share of her husband's personal property upon his death, under the Scots law of the jus relictæ (which jus vests in the wife only upon the death of the husband), even though coupled with an indemnity by the husband in damages if the spes should be disappointed, is not an "estate or interest in personal property" coming to her "during the coverture," within the meaning of the usual covenant in a marriage settlement for the settlement of the wife's after-acquired property.

Decision of Buckley J. reversed.

By the ante-nuptial settlement, dated January 27, 1873, of William Simpson, a domiciled Scotsman, and Alice Isabel Simpson his wife, then Alice Isabel Hall, spinster, after reciting (inter alia) that the wife was entitled to a reversionary interest in a sum of Consols, and that upon the treaty for the then intended marriage it was agreed that such interest should be settled as thereinafter mentioned; and also that such provisions should be made "for the settlement of all other present or future acquired property (if any)" of the

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wife as were thereinafter contained: It was witnessed that the wife's said reversionary interest was thereby assigned to trustees, upon certain trusts, after the intended marriage, for the benefit of the wife, the husband, and the issue of the marriage. The settlement then contained the following clause: "And this indenture also witnesseth that in pursuance of the said agreement in this behalf each of them the said Alice Isabel Hall and William Simpson doth hereby for himself and herself, and his and her heirs, executors, and administrators, covenant with the said (trustees), their executors and administrators, in manner following (that is to say), that if the said A. I. Hall now is or if at any time during the said intended coverture the said A. I. Hall or the said W. Simpson in her right shall become in any manner entitled to or acquire an absolute power of disposition over any real or personal property which shall amount or be equal in value, from any one source at any one time, to the sum of 200*l.* for any estate or interest whatsoever," except as therein mentioned, "then and in such case the said A. I. Hall and W. Simpson and each of them, their and each of their heirs, executors, and administrators, and all other necessary parties, shall and will, at the cost of the trust property, from time to time, as soon as circumstances will admit, effectually settle and assure such other present or after-acquired property, with the exception aforesaid, or cause the same to be well and effectually vested in such trustees or trustee," upon trust for conversion and to stand possessed of the proceeds upon the trusts thereinbefore declared of the said reversionary interest: provided always, that it should not be obligatory on the trustees to convert into money any other present or after-acquired property which was of a reversionary nature whilst the same should continue reversionary.

Upon April 13, 1895, a separation deed executed by Mr. and Mrs. Simpson was registered in Scotland. Both of them were then residing in Scotland, and the deed was drawn up in the Scots form. It was thereby "contracted and agreed" between the parties that they should separate a mensa et thoro; that the husband should pay the wife, during the joint lives of

the spouses, an annual sum for the maintenance and aliment of herself and the three children of the marriage; and by clause 5 the husband assigned certain of his funds and securities therein specified, to the amount of about 9000*l.*, to trustees upon trusts for securing the performance of his obligations under the deed, with a provision that on the death of either husband or wife the trust thereby constituted should cease and determine, and the trustees should be bound to denude themselves thereof and deliver up and retransfer the securities held thereunder to the husband. Clause 7 was as follows: "The parties hereto declare these presents in all the articles and heads thereof to be irrevocable by either of them without the consent of the other, and both parties consent to these presents being construed according to the law of Scotland, and they subject themselves to the jurisdiction of the Court of Session in Scotland in all questions which may arise between them relating to the personal status and patrimonial interests of both or either of them in the same way and to the same effect as if they should be at the time domiciled in Scotland, whether they may in fact be at the time domiciled there or elsewhere: and the first party (the husband) hereby agrees and undertakes that in the event of his death survived by the second party (the wife) her rights in his means and estate shall not be less than she would have been entitled to by the law of Scotland if he had been a domiciled Scotchman at the date of his death, notwithstanding he may have been in fact domiciled elsewhere at the date of that event . . . ."

On July 15, 1902, Mr. Simpson died while resident in England, having made a will in which he described himself as "domiciled in England." He appointed the plaintiffs his executors. The will contained no provision for his widow. He left personal estate to the amount of 16,061*l.* Upon his death, Mrs. Simpson became entitled, under the separation deed and according to the law of Scotland, to one-third of that sum—that is, to about 5353*l.* The question then arose whether this one-third share belonged to Mrs. Simpson as her own property, or whether it was bound by the covenant in her marriage settlement for the settlement of her after-

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acquired property. To have this question decided, an originating summons was taken out by Mr. Simpson's executors against Mrs. Simpson and the trustees of the settlement (all objections to jurisdiction being waived) for the determination of the question whether the plaintiffs were justified in paying over to the defendant, Mrs. Simpson, the one-third share of her deceased husband's estate to which she was entitled under the separation deed, or whether the plaintiffs should pay such share to the defendants, the trustees of the marriage settlement. There had been issue of the marriage four children, of whom three, two daughters and a son, were now living.

On behalf of Mrs. Simpson there was an affidavit by a Scottish advocate to the effect that the right which the widow of a domiciled Scotsman has in his means and estate, according to the Scottish law, is known as the jus relictæ, a right which vests in her upon the death of her husband. If there are children of the marriage surviving at the husband's death the right extends to one-third of the husband's personal or movable estate, the children being entitled to one-third as legitim, and the remaining one-third going to the husband's legatees under will or to his heirs in mobilibus. The jus relictæ extends only to the present or movable estate belonging to the husband at the time of his death; during his life he is at liberty to deal with his estate in any way he pleases; consequently the prospective right of the widow can be entirely defeated by alienation of his personal estate by the husband during his life. The right has thus come to be regarded as a provision emerging to the widow out of a deceased husband's personal estate and vesting in her by survivorship. Jus relictæ is therefore nothing more than a right of succession which cannot be defeated or prejudiced by any mortis causa deed of the husband, but which, until the dissolution of the marriage, is a bare spes successionis.

The deponent went on further to state that the separation deed on its construction "according to the law of Scotland," as provided for by the deed, did not purport to and did not in fact give Mrs. Simpson any interest in or title to, or any

power of disposition over any of her husband's property during his lifetime, apart from the provision made for her by means of the 9000*l.* settled by the deed, nor did it in any way prevent him from alienating or disposing, during his life, of his whole property, including his interest in the 9000*l.* settled by the deed.

The summons was heard by Buckley J. on March 13, 1903. In delivering judgment his Lordship said that, having regard to the terms of the separation deed, the case must be treated as if the husband had been a domiciled Scotsman at the date of his death; that, although, according to the Scots law, she had not, during the actual coverture, any property at all in one-third of her husband's personal estate, yet during the coverture she was entitled to a covenant, contained in the separation deed, and enforceable at her husband's death, for payment of an unascertained sum which might have been nothing, but which turned out to be 5353*l.* (one-third of the 16,061*l.*); and that that covenant was property of hers and was bound by the settlement. His Lordship accordingly made a declaration that the one-third share of the husband's personal estate (after payment of his debts, funeral and testamentary expenses), to which the defendant, Mrs. Simpson, was entitled under the separation deed in the events which had happened, should be paid to the trustees of the marriage settlement as being after-acquired property covenanted to be settled by the defendant, Mrs. Simpson; the costs of the application to be paid out of such one-third share.

Mrs. Simpson appealed.

The appeal was heard on November 9, 10, 1903.

Wace, for the appellant. During the husband's life the wife had no interest under the separation deed beyond a mere spes successionis, with the addition of a covenant that that interest should not be defeated in the event of the death of the husband domiciled elsewhere than in Scotland. General words in a covenant for the settlement of future property of a wife must be construed with regard to the object of such a covenant, namely, to exclude the husband. Consequently the

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covenant applies only to property acquired by the wife during the coverture: *In re Edwards* (1), in which *Dickinson* v. *Dillwyn* (2) and *Carter* v. *Carter* (3) were approved. The protection intended by the covenant is not needed where the wife is not entitled until after the husband's death: *Fisher* v. *Shirley*. (4) The interest the wife took under this separation deed was not property as to which the covenant could protect the wife against her husband. It has been held that such a covenant would not apply to a gift made by a husband to his wife during the coverture. And in *Davenport* v. *Marshall* (5) it was held that property acquired by a wife during a judicial separation between her and her husband was not bound by a covenant to settle her future property.

[ROMER L.J. May not the 200*l.* limit shew that the property to which the covenant applies must be such that you would be able to predicate at some time during the coverture that it is worth more than 200*l.*?]

The covenant in the separation deed itself indicates that such an interest as this is not property included in the covenant to settle. A jus relictæ is a mere right in the husband's estate—a right which vests in the wife only in the event of her husband's death; in his lifetime—that is, during the coverture—she has no right or property in his estate.

C. E. Bovill, for the trustees of the settlement. Immediately before the execution of the separation deed the position was this—the wife had a spes successionis under the law of Scotland if the husband remained domiciled there. The separation deed entirely altered this state of things; under it the wife became entitled to one-third of her husband's personal property, whether he should be a domiciled Scotsman at the time of his death or not. By paragraph 5 of the separation deed the 9000*l.* was to go back to the husband on the determination of the coverture. The Court will not speculate about the value of a reversionary interest.

(1) (1873) L. R. 9 Ch. 97.
(2) (1869) L. R. 8 Eq. 546.
(3) (1869) L. R. 8 Eq. 551.
(4) (1889) 43 Ch. D. 290, 295.
(5) [1902] 1 Ch. 82.

[STIRLING L.J. Up to the time of the husband's death he could part with any portion of his property.]

It is essential that the Court should be able to see that the reversionary interest had at the date of the separation deed no value. But in fact 5333*l.* is now coming either to the wife or, by virtue of the covenant in the settlement, to the trustees. The object of the covenant was, of course, to bring into settlement only property of substantial value.

[ROMER L.J. Suppose a covenant by some one to pay the wife 200*l.* five years after her husband's death? That could never have been of the value of 200*l.* during the coverture.]

In the present case the value of the property is now known.

[VAUGHAN WILLIAMS L.J. referred to *Laffitte & Co.* v. *Laffitte* (1) as to the right to indemnity in damages for breach of contract.]

This is a contingency subject to a defeasance. The interest is a contingent defeasible interest: it is similar to the interest of a person entitled in remainder on the determination of a prior life interest, subject to that interest in remainder being defeated by an appointment by the tenant for life under a power. This should be treated as if it were a vested reversionary interest subject to being divested by the exercise of a power of appointment, which is an interest that would be caught by such a covenant as this.

[STIRLING L.J. But the wife had no "estate or interest" during the coverture in her husband's property.]

She had, under the contract in the separation deed, one-third of at least 9000*l.*, subject to defeasance. The contract by the husband is to pay, in a certain event, a sum of money uncertain at the moment.

J. Israel, for the husband's executors.

VAUGHAN WILLIAMS L.J., after reading the covenant in the settlement and also clause 7 of the separation deed, proceeded:— Mr. Simpson died, and Mrs. Simpson is now living. It turns out that Mr. Simpson had at his death personal property which was subject to the widow's right in respect of the jus

(1) (1873) 42 L. J. (Ch.) 716.

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relictæ according to the law of Scotland, and that the one-third share of that property to which the widow was by the Scottish law so entitled amounted to about 5333*l*. What we have to consider is whether the sum to which the wife so became entitled should be handed over to the trustees of her marriage settlement, or to herself.

Now that depends upon two considerations: one must ascertain what is the meaning of the words used in the settlement; and then what is the meaning of the words in the deed of separation; and one must see whether the sum to which Mrs. Simpson became entitled under that deed of separation falls within or without the operation of the clause in the marriage settlement.

Now, what is the right that Mrs. Simpson gets under the separation deed? She gets, to my mind, the benefit of a covenant and nothing else. It is the benefit—to put it shortly—of the indemnity of her husband against any loss accruing to her under her spes successionis (which, during the life of her husband, her right was) in the event of his losing his Scottish domicil and acquiring another domicil. That indemnity is against the loss of her spes successionis and nothing more: both sides agree upon that. We have before us the opinion of a Scots lawyer, and it appears from his statement that the following is the nature of the jus relictæ. It is a right which the wife has to come in and prove against the estate of her late husband—a right secondary only to the rights of his creditors. Now, when one has to consider what the right of Mrs. Simpson under this covenant in the separation deed is, it seems clear that the covenant is a covenant of indemnity, and Mrs. Simpson's right is really a right to damages under the covenant if it is broken. This being the nature of Mrs. Simpson's right, the claim obviously cannot arise during the coverture. It is not a claim certain in its nature at any time during the coverture. It is only, during the coverture, a possible claim to damages which may accrue to her after the death of her husband.

That then being the nature of Mrs. Simpson's right, one has to look at the covenant in the settlement and see

whether or not this claim falls within the terms of that covenant. That really depends upon the meaning of the word "property" in this covenant; and, in considering what is the meaning of the word, one must look at the settlement as a whole and construe it in the light of the covenant. It seems to me, when we consider what is the object of the settlement, as stated by James L.J. in his judgment in *In re Edwards* (1), that this claim cannot be said to fall within the operation of the covenant in the settlement, and that the "property" mentioned in the covenant in the settlement cannot be said to extend to a claim for indemnity, a claim for damages, for a possible claim only and one which cannot arise in the lifetime of the husband, that is to say, during the coverture, but is of such a nature that it is dependent upon a contingency the happening of which cannot be calculated by actuarial tables.

In my judgment this one-third share does not fall within the word "property" as used in the covenant in the settlement. For these reasons I am of opinion that the judgment of Buckley J. is wrong, and therefore this appeal must be allowed.

ROMER L.J. With reference to the sum of money now in question, it is clear to my mind that it represents no property in which the wife can be said to have had an "estate or interest" during the coverture, within the covenant to settle after-acquired property contained in the marriage settlement. But it is said that such right or claim as she had by virtue of her position as wife, coupled with the provision in clause 7 of the deed of separation, constituted "personal property" within the covenant contained in the after-acquired property clause in the settlement. In my opinion, that view is not correct. To my mind, the effect of clause 7 in the separation deed was to secure to the wife the jus relictæ to which, on the death of her husband, she would be entitled if he died a domiciled Scotsman, coupled with a right of indemnity to a commensurate extent if, by his change of domicil or otherwise, she should be deprived of her jus relictæ: in other

(1) L. R. 9 Ch. 97.

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words, she had a mere hope of succession coupled with an indemnity if that hope should be disappointed. Now, it is clear that a mere spes successionis could not fall within the covenant to settle after-acquired property; the only question there can be is whether the claim to indemnity in case the spes failed constituted "property" within the meaning of the covenant. In my opinion that claim cannot represent property to which she was entitled during the coverture within the meaning of the covenant. It was only a claim for damages: it was not a claim for damages during the coverture, but a contingent claim for damages on the husband's death, a claim that could not arise until after the husband's death. In my opinion, it cannot be said that such a claim could, upon any fair construction of the covenant, fall within the words "if at any time during the said intended coverture the said A. I. Hall . . . . shall become in any manner entitled to . . . . any . . . . personal property which shall amount or be equal in value, from any one source at any one time, to the sum of 200*l.* for any estate or interest whatsoever." This claim was not personal property of that kind at all. Certainly no one, "at any time during the coverture," could have said, in the first place, that any such claim to indemnity could then arise; and certainly it could not be said "at any time during the coverture" that such a claim constituted personal property of the amount or value of 200*l.* Bearing in mind what the object of these covenants is, and how they are construed by the Court, I am of opinion that, upon a fair construction of the covenant contained in this settlement, any such claim as this is not covered by it.

STIRLING L.J. I am of the same opinion. In this case the learned judge decided two points: first, that the right of the wife under the law of Scotland, the jus relictæ, was not bound by the covenant in the settlement to settle after-acquired property. The accuracy of that position has not been disputed by either side, and, in my opinion, it cannot be disputed. The learned judge further decided that, inasmuch as by the deed of separation the wife acquired a contractual right, that

contractual right was property which was bound by the covenant, and, as to that, the question has been argued very fully and very ably before us.

Now, what was the contractual right that the wife acquired? It was that, if she survived her husband, her right in his estate should not be less than if he had been a domiciled Scotsman at the time of his death. That right could only arise upon the death of the husband—that is to say, after the determination of the coverture. If the obligation imposed by the stipulation in the deed of separation were broken on his part, the right of the wife would be to damages, which could only be ascertained after the husband's death—that is, after the determination of the coverture. That right conferred by contract upon the wife gave her no right or interest in or to any part of her husband's property during the coverture: it only gave her damages in the event I have mentioned, and, in my opinion, she had no more interest in the sum of about 9000*l.* settled by clause 5 of the separation deed than in any other part of the husband's property.

Now, the contention is that a right of this nature is "property" within the meaning of the covenant in the marriage settlement. Regard being had to the object of these covenants, I confess I have the greatest difficulty in arriving at that conclusion. But even if this were the true view of the question, it appears to me that this was property of which the value was quite incapable of being estimated while the coverture continued, and that it cannot be regarded as falling within the description of property of the amount or value of 200*l.* which was bound by the covenant in the settlement. Upon that point, which was not considered by the learned judge, I am of opinion that his decision ought to be reversed.

[Their Lordships accordingly made a declaration to the effect that the one-third share in question was not bound by the marriage settlement, and should be paid over to the appellant, Mrs. Simpson, as her own property.]

Solicitors: *Routh, Stacey & Castle; J. P. Simpson.*

G. I. F. C.

C. A.
1903
Nov. 23.

In re TEA CORPORATION, LIMITED. SORSBIE *v.* SAME COMPANY.

[00153 of 1903.]
[1902 S. 1894.]

Company—Winding-up—Scheme of Arrangement with Creditors and Contributories—Sanction of Court—Dissent of Class of Contributories having no Interest in Assets—Joint Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104), *s.* 2—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 24.

Under s. 2 of the Joint Stock Companies Arrangement Act, 1870, combined with s. 24 of the Companies Act, 1900, the Court has jurisdiction to sanction a scheme of arrangement with the creditors and contributories of a company in liquidation, notwithstanding the dissent of one class of contributories, if the Court is satisfied that having regard to the value of the company's assets that class has no interest in them.

Under such circumstances the scheme must be treated as made between the company and their creditors, and between the company and the other classes of contributories, and a provision made by it for the benefit of the dissentient class must be regarded as in the nature of a gift or concession to them.

Decision of Buckley J. affirmed.

Appeal from an order of Buckley J. sanctioning a scheme of arrangement made by the above company with creditors and contributories.

The corporation was incorporated on July 24, 1897, with a nominal capital of 200,000*l.*, divided into 20,000 preference shares of 5*l.* each and 20,000 ordinary shares of 5*l.* each. The preference shares had a preference as regarded capital as well as dividends. There had been issued 13,000 of the preference shares and 10,300 of the ordinary shares. All the shares had been paid up in full except 426, on which calls amounting to 2130*l.* were in arrear. The principal object of the company was to acquire estates in Ceylon and to carry on there the business of tea planters.

Shortly after its incorporation the company acquired some tea estates in Ceylon, the area of which was more than 7000 acres, chiefly of freehold tenure.

In the year 1897 the company created first mortgage deben-

ture stock to the amount of 65,000*l.*, bearing interest at 5 per cent. per annum.

On December 20, 1897, a trust deed to secure this stock was executed between the company of the one part, and the Debenture Corporation and T. J. Lawrence, as trustees for the debenture stockholders, of the other part. The whole of this debenture stock had been issued and remained outstanding.

In the year 1902, owing to depression in the tea trade, the company became unable to keep down the interest on the debenture stock, and on December 2, 1902, the trustees of the trust deed, under the powers contained in it, appointed a receiver, who took possession of the company's estates in Ceylon, and proceeded to carry on the company's business thereon.

The above action was brought on behalf of the debenture stockholders, and in it an order was made by Byrne J. on January 26, 1903, that the trusts of the trust deed should be carried into execution, and it was declared that the holders of the debenture stock were entitled to a charge upon the property comprised in the deed for securing the repayment of the principal and interest owing in respect of the debenture stock, and the usual accounts and inquiries were directed to be taken and made.

On March 12, 1903, an extraordinary general meeting of the shareholders was held at which an extraordinary resolution, in accordance with sub-s. 3 of s. 129 of the Companies Act, 1862, was passed to the effect that it had been proved to the satisfaction of the company that the company could not by reason of its liabilities continue its business, and that it was desirable to wind up the company, and a liquidator was appointed.

At meetings of the shareholders under s. 161 of the Companies Act, 1862, held on April 24 and May 20, 1903, resolutions approving of a scheme for the reconstruction of the company were duly passed, but that scheme was afterwards abandoned.

The trustees of the trust deed then issued a summons in the above action for liberty to sell the property and assets comprised in the deed. The summons was returnable on June 30, 1903.

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A scheme of arrangement under the Joint Stock Companies Arrangement Act, 1870, was then prepared, and on July 24, 1903, a petition was presented by the company and the liquidator to obtain the sanction of the Court to the scheme.

The petition was entitled in the action; in the matter of the company; and also in the matter of the Companies Acts, 1862 to 1900, and in the matter of the above Act of 1870.

The scheme was sanctioned by the Court with some slight modifications, and as modified it provided as follows:—

"1. A new company shall be formed under the Companies Acts, 1862 to 1900, as a company limited by shares, with the same name as the present company, or with such other name as may be determined by the liquidator with the approval of the Court.

"2. The capital of the new company shall be 70,000*l.*, divided into 70,000 shares of 1*l.* each. The objects of the new company shall include the acquisition and undertaking of all or any of the assets and liabilities of the present company. The memorandum and articles of association of the new company shall be framed in accordance with the draft which has already been prepared with the privity of the liquidator. The first directors of the company shall be Alfred Bull, Thomas James Lawrence, and Vivian Hugh Smith, or, in case of the refusal or inability of any of the said persons to act as director, some other person nominated in his place by the liquidator with the approval of the Court.

"3. The liquidator shall enter into an agreement with the new company for the adoption of this scheme by the new company and for the transfer to the new company, upon the footing and subject to the provisions of this scheme, of the assets of the present company.

"4. The new company shall create first mortgage debenture stock, charged by way of fixed charge on its immovable property in Ceylon, and by way of floating charge on the rest of its undertaking, property, and assets, and bearing interest at 4*l.* 10*s.* per cent. per annum as from the 1st July, 1903. The company shall be bound to redeem the stock at par on the 31st December, 1940. The amount of the stock shall be 52,000*l.* The

trust deed securing the stock shall be framed in accordance with the draft already prepared with the privity of the liquidator. The trustees of the stock shall be the Debenture Corporation, Limited. The debenture stock is to be reduced to 40,000*l.* by purchase or drawings as provided by the said draft deed, the new company for that purpose applying its profits up to at least 1000*l.* per annum.

"5. The new company shall pay to each debenture stockholder of the present company a sum in cash equal to 20 per cent. of the nominal amount of his holding, and all arrears of interest thereon to the 1st July, 1903, and shall allot to him first mortgage debenture stock of the new company to the amount of 80 per cent. of his holding, and in exchange for such payment and for the certificate for such stock of the new company he shall surrender his debenture stock of the old company and deliver up his certificate for the same, and shall be deemed to accept such payment as aforesaid and the delivery of the certificate for the stock of the new company as complete satisfaction for all his claims in respect of the debenture stock of the old company.

"6. The new company will take over and discharge all the liabilities of the old company (other than its liabilities in respect of the principal and interest on its debenture stock), and will pay and discharge all the costs, charges, and expenses of the trustees of the deed securing the present company's debenture stock and of the receiver appointed by them, and all the costs as between solicitor and client of all parties of the action: *Sorsbie* v. *The Tea Corporation, Ld.* [1902 S. 1894], and also all the costs of and incidental to the winding-up and dissolution of the present company, including the costs of and incidental to this scheme and to carrying the same into effect.

"7. Each holder of preference shares in the present company shall, in respect of each such preference share of 5*l.* held by him, be entitled to claim an allotment of four shares of 1*l.* each in the new company, with a sum of 10*s.* per share credited as paid up thereon.

"Each holder of ordinary shares in the present company, in respect of each such ordinary share, shall be entitled to claim

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an allotment of one share of 1*l.* in the new company, with a sum of 10*s.* per share credited as paid up thereon.

"8. The new company shall not be bound to allot any shares hereunder to any person, whose registered address in the books of the old company is in the United Kingdom, Ireland, the Channel Islands, France, or the Empire of Germany, unless, within twenty-eight days from the date of the posting of the notice to him by the liquidator of his right to claim the shares to which he is entitled, he shall by writing addressed to the new company claim the allotment, and shall in respect of each partly paid share for which he shall apply pay 1*s.* on application. As regards any person whose registered address in the books of the old company is in Ceylon, the company shall not be bound to allot any shares hereunder to any such person, unless within eight weeks from the date of the posting of the said notice he shall by writing addressed to the new company claim the allotment, and shall in respect of each such share for which he shall apply pay 1*s.* on application. The balance on each partly paid share shall be paid as to 4*s.* on allotment, and as to 5*s.* within three months from allotment. The liquidator shall, within seven days after this scheme shall be sanctioned as aforesaid, give to each member notice thereof at his registered address.

"9. The liquidator of the present company shall sell for what they will fetch such of the above-mentioned shares of the new company as the members of the present company shall be entitled to claim, but shall not claim within the respective periods aforesaid, and the new company shall allot the said shares to the purchasers, and the net purchase-money received by the liquidator for the said shares (after deducting expenses of sale) shall be distributed rateably amongst those shareholders who were respectively entitled to claim, but did not within the respective periods aforesaid claim such shares.

"10. As soon as conveniently may be after this scheme becomes binding, the present company and the liquidator and all other necessary parties shall do and execute all such deeds and documents as may be necessary for the conveyance and transfer to the new company of the property of the present

company in the terms of this scheme, and for otherwise carrying this scheme into effect. Until the transfer to the new company of the business of the present company in pursuance of such deeds or documents, the receiver and the liquidator shall be deemed to be carrying on the same on account of the new company as a going concern, but until the assignment and transfer the receiver and the liquidator shall be at liberty to discharge out of the same any debts and liabilities to be undertaken by the new company.

"11. All further proceedings in the action of *Sorsbie* v. *The Tea Corporation, Ld.* [1902 S. 1894], shall be forthwith stayed.

"12. All further proceedings in the liquidation of the present company shall be stayed, except such as may be necessary for carrying into effect this scheme or the order confirming the same.

"13. Unless (*a*) this scheme is adopted by the new company within three weeks after the sanction of this scheme by the Court, and (*b*) all the said shares to be allotted hereunder are duly allotted within ten weeks after such sanction, the liquidator may, with the sanction of the Court, declare that the scheme has fallen through, and thereupon the winding-up of the present company shall proceed in due course, and all the other provisions of this scheme shall be at an end.

"14. The liquidator may assent to any modification in this scheme, or to any condition which the Court may think fit to approve or impose.

"15. Nothing in this scheme contained shall affect any charge, lien or security, except as herein otherwise expressly provided."

By the direction of the Court separate meetings were held of the debenture stockholders, the unsecured creditors of the company, the preference shareholders, and the ordinary shareholders, for the purpose of considering the scheme.

At the meeting of the debenture stockholders thirty-five holders, whose holdings amounted to more than 47,000*l.*, were present, and a resolution approving of the scheme was passed unanimously.

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At the meeting of the unsecured creditors five creditors, whose debts amounted to 11,187*l.*, were present, and they unanimously approved of the scheme. The unsecured debts of the company amounted to about 12,000*l.*

At the meeting of the preference shareholders thirty-five shareholders, whose holdings amounted to 6445 shares, were present. Of these twenty, holding 5173 shares, voted in favour of a resolution approving of the scheme, and nine, holding 652 shares, voted against the resolution. The resolution was therefore carried by the proper statutory majority.

At the meeting of the ordinary shareholders twenty-four shareholders, whose holdings amounted to 1958 shares, were present. Of these eight, holding together 1269 shares, voted in favour of a resolution approving of the scheme, and sixteen, holding together 689 shares, voted against the resolution. The resolution was therefore not carried by the proper statutory majority, and was lost.

The petition alleged that the proceeds of the company's assets if realized would be insufficient to leave any surplus for distribution among the contributories, and that they had therefore no interest in the matter.

Buckley J. came to the conclusion that the company's assets might realize 20,000*l.* more than the amount of the debts, so that, after paying the creditors, there would not be enough to pay the preference shareholders in full, and that consequently the ordinary shareholders had no interest in the matter. His Lordship accordingly, on August 7, 1903, made an order sanctioning the scheme, and declaring it to be binding on the mortgage debenture stockholders and the creditors and contributories of the company, and also on the liquidator thereof.

One of the ordinary shareholders appealed.

Buckmaster, K.C., and *Austen-Cartmell*, for the appellant. It is contended that such a scheme as this could not be sanctioned by the Court under the Act of 1870. Under s. 161 of the Companies Act, 1862, rights are given to dissentient shareholders, and this scheme deprives them of those rights.

Sect. 2 of the Act of 1870 (1) applies to creditors, and it has no application to contributories. But, before sanctioning a scheme of arrangement with creditors under the Act of 1870, the Court has required meetings of the contributories to be held: *In re English, Scottish and Australian Chartered Bank* (2); *In re London Chartered Bank of Australia.* (3) Dissentient shareholders cannot be deprived of the rights given to them by s. 161. It is submitted that s. 24 of the Companies Act, 1900, does not take away their rights under s. 161 of the Act of 1862. This scheme compels the ordinary shareholders either to give up their rights altogether, or to accept instead of them shares in the new company with a liability to calls. Sect. 24 of the Act of 1900 does not enable the company to bind the shareholders by a scheme which imposes a new liability on them. That can be done only under s. 161 of the Companies Act, 1862, and with the safeguards there provided.

But, if s. 24 does enable the Court to bind contributories by such a scheme, it can only do so if resolutions approving the scheme have been passed by every class of contributories in the same way as, in order to bind the creditors, resolutions in favour of the scheme must be passed by every class of

(1) By the Joint Stock Companies Arrangement Act, 1870, s. 2, "Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the Companies Acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct, and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

By the Companies Act, 1900, s. 24, "The provisions of s. 2 of the Joint Stock Companies Arrangement Act, 1870, shall apply not only as between the company and the creditors, or any class thereof, but as between the company and the members, or any class thereof."

(2) [1893] 3 Ch. 385.

(3) [1893] 3 Ch. 540.

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creditors. In the present case the ordinary shareholders have rejected a resolution approving the scheme. So that if s. 24 renders s. 2 of the Act of 1870 applicable to contributories the conditions of the section have not been complied with. In *In re Canning Jarrah Timber Co.* (1) the Court of Appeal, in sanctioning a scheme under the Act of 1870, which imposed a new liability on the shareholders, required the liquidator to undertake that the dissentient shareholders should be entitled to the rights given to them by s. 161 of the Act of 1862. In that case there had been a preliminary special resolution under s. 161 authorizing a transfer of the company's assets to a new company. There has been no such resolution in the present case. It is submitted that the contributories can be bound only under s. 161; at any rate, a new liability cannot be imposed on them. In *In re Brownfields Guild Pottery Society* (2) the Court, in sanctioning a scheme under the Act of 1870, did not require any meeting of the shareholders to be called, but the scheme did not impose any new liability on them.

[*Clauson*, for the liquidator. The scheme in that case is set forth in Palmer's Company Precedents, 8th ed. Part II. p. 819.]

Here the evidence shews that the company's property is likely to become much more valuable.

Manby, for ordinary shareholders, supported the appeal.

Mark Romer, for other ordinary shareholders. The new company are to give something to the ordinary shareholders, and the inference is that their shares have some value. It is submitted that the Court has no jurisdiction to sanction the scheme unless it is approved by the proper majority of each class of shareholders.

A. àBeckett Terrell, for the plaintiff in the action, supported the scheme.

Eve, *K.C.*, and *Clauson*, for the company and the liquidator. It was admitted in the Court below that the assets if realized would not produce more than 20,000*l.* beyond the amount of the debts. The preference shareholders have a preference as

(1) [1900] 1 Ch. 708. (2) W. N. (1898) 80.

regards capital, and the nominal amount of the preference shares is 65,000*l*. Consequently, there is nothing left for the ordinary shareholders. No doubt before the Act of 1900 schemes have been sanctioned by the Court when there was no evidence that the value of the company's assets did not exceed the amount of the debts. The case is somewhat analogous to the Australian bank cases; probably if there was a forced sale the creditors would take the whole. It is contended that by virtue of s. 2 of the Act of 1870 and s. 24 of the Companies Act, 1900, the Court can sanction the scheme as an arrangement between the company and their creditors and the preference shareholders. The ordinary shareholders have under the circumstances no interest in the assets. This jurisdiction is conferred independently of s. 161 of the Companies Act, 1862. The decision in *In re Canning Jarrah Timber Co.* (1) did not turn upon s. 161; the Court only required as a condition of its sanction that the dissentient shareholders should be placed in the same position as they would have been under that section. Such a condition might, if necessary, be imposed here. But, it is submitted, it is not necessary, because the ordinary shareholders have really no interest. The scheme is a fair and proper one as between the company and their creditors, and as between the company and the preference shareholders, and the ordinary shareholders have no interest in the matter.

Rowden, K.C., and *Gordon Brown*, for the trustees of the trust deed and a large holder of debenture stock. The Act of 1870 was passed for the benefit of creditors; s. 24 of the Act of 1900 was intended to extend that benefit to contributories.

Buckmaster, K.C., in reply.

VAUGHAN WILLIAMS L.J. Two questions of law are raised in this case. Buckley J. has found as a fact that the value of the company's assets is such as to negative the notion that the ordinary shareholders have any financial interest whatever in them, and it is not denied that on the evidence before him the learned judge was right in coming to that conclusion. Some further affidavits have been since made for the purpose of

(1) [1900] 1 Ch. 708.

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shewing that the learned judge was misinformed as to the value of the assets, but I do not think we ought to allow those affidavits to be read. That being so, we must take it that the conclusion of Buckley J. upon the facts was right.

Then the first question of law is this. It is said that the present scheme is one which might have been carried into effect under s. 161 of the Companies Act, 1862; and, it being a scheme of that character, it is said that you cannot have a scheme which embraces that which might have been done under s. 161, unless in some way the dissentient shareholders are placed in the position in which they would have been placed in a scheme carried out under s. 161. In my opinion that proposition is much too wide. Reference has been made to the cases of the Australian banks—*In re English, Scottish and Australian Chartered Bank* (1) and *In re London Chartered Bank of Australia* (2)—in which the Court directed meetings of the contributories to be held to consider proposed schemes of arrangement with creditors under the Act of 1870, and thus recognised a right of the contributories to be consulted. But it is said that those cases have no application to the present case, because if the whole of this company's property was converted into money for the purpose of paying its debts there would be no surplus to go to the ordinary shareholders. And it was said that in giving the ordinary shareholders of the old company an option to take up shares in the new company, on which a certain amount was to be credited as paid up, you were not giving them any interest in consideration of their surrendering their old shares; but this offer was a gratuitous act on the part of the debenture stockholders and preference shareholders, for if they insisted on their strict rights there would be nothing left for any one else. That may be true. But then it is said that here it is common ground that, if the company's assets were realized, something would be left for the preference shareholders, and it is contended that this scheme could not be carried out under the Act of 1870 without having recourse to s. 161 of the Companies Act, 1862. I am not sure how that may be. Under the Act of 1870 alone it may be the Court

(1) [1893] 3 Ch. 385. (2) [1893] 3 Ch. 540.

would have refused to sanction such a scheme, unless it had been satisfied that the ordinary shareholders had been consulted about it. But, be that as it may, we have now s. 24 of the Companies Act, 1900, which, as it seems to me, removes any difficulty of that sort. [His Lordship read s. 24, and continued:—]

It is, I think, quite plain that by this section the Legislature intended that the contributories should have a right to vote in a manner similar to that in which the creditors were to vote under the Act of 1870, and that they should be bound in the same way. Under the Act of 1870 the creditors were to be divided into classes, and each class was to vote separately, and under s. 24 the contributories are to be dealt with in the same way. In the present case the contributories were divided into two classes, preference shareholders and ordinary shareholders, and they voted in those classes, and the majority of the preference shareholders voted in favour of the scheme. It is said, however, that the scheme is rendered defective because the ordinary shareholders did not vote in favour of it. I think the right answer to this was given by Buckley J. You are to divide the shareholders into classes, and when you have done that you find that the preference shareholders have an interest in the assets. But when you come to the ordinary shareholders you find that they have no interest whatever in the assets, and Buckley J. was of opinion that, having regard to this fact, their dissent from the scheme was immaterial. I think that the learned judge was right in so holding. It seems to me that by the very terms of s. 24 you are to divide the contributories into classes and to call meetings of each class, and if you have the assent to the scheme of all those classes who have an interest in the matter, you ought not to consider the votes of those classes who have really no interest at all. It would be very unfortunate if a different view had to be taken, for if there were ordinary shareholders who had really no interest in the company's assets, and a scheme had been approved by the creditors, and all those were really interested in the assets, the ordinary shareholders would be able to say that it should not be carried into effect unless some terms were

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made with them. In my opinion the decision of the learned judge was right, and the appeal should be dismissed.

ROMER L.J. I agree. If you were to look only at the scheme as prepared and did not know the facts, you would conclude that it did involve an arrangement or compromise between the company and the ordinary shareholders. But, in my opinion, the respondents are not estopped from setting forth the real facts, and contending, as they have done, (1.) that the ordinary shareholders have in fact no interest in the matter, and (2.) that this scheme is really put forward as an arrangement between the company and their creditors, and between the company and the preference shareholders, leaving out the ordinary shareholders as having really no interest in the matter. The learned judge, as I understand, came to the conclusion upon the evidence before him as to the value of the company's assets that the ordinary shareholders had no interest in the assets, and I cannot gather from the appellant's counsel that the judge was in substance wrong in coming to that conclusion. Having regard to the evidence and the admissions made in the Court below, I think he was right in drawing the inference that the ordinary shareholders had no interest, and I base my judgment solely on that ground.

That being so, I can see no difficulty in holding that this scheme is only an arrangement as between the company and their creditors and as between the company and the preference shareholders, and as such it is authorized by s. 2 of the Act of 1870 combined with s. 24 of the Companies Act, 1900. It is true that by the scheme some shares in the new company are offered to the ordinary shareholders in the old company; but I think that must be regarded as rather in the nature of a gift by the creditors and the preference shareholders to the ordinary shareholders, and not as shewing that they had an interest in the assets which they were surrendering. Certainly the ordinary shareholders cannot be heard to complain of a gift being made to them when they had no right to it but for the scheme, and there is no appeal on behalf of the creditors or the preference shareholders from this provision of the scheme.

In my opinion, therefore, the scheme was rightly sanctioned by the learned judge.

STIRLING L.J. I am of the same opinion. There are three classes of persons who claim to be interested in the assets of the company, namely, (1.) the creditors of the company, secured and unsecured; (2.) the preference shareholders; (3.) the ordinary shareholders. Having regard to what took place in the Court below, it must, I think, be taken that the assets are not sufficient to meet the claims of the creditors and the preference shareholders, and that the ordinary shareholders have no interest. In this state of things it seems to me that it was within the power of the Court to sanction the scheme, as regards the creditors under s. 2 of the Act of 1870, and as regards the preference shareholders under that section combined with s. 24 of the Companies Act, 1900. But it is objected that the scheme gives to the ordinary shareholders an option to take shares in the new company, and that the inference is that they had an interest in the assets. It is answered that the scheme deals only with the creditors and the preference shareholders, and that the offer of shares to the ordinary shareholders is really a concession to them on the part of the preference shareholders which those shareholders were entitled to make. It seems to me that this is the right view. Whether this option could have been given against the wish of the preference shareholders is another question. But the ordinary shareholders are not entitled to complain of it. In my opinion the decision of the learned judge was right.

Solicitors: *R. R. G. Norman; S. J. R. Stammers; W. S. Morris; Linklater & Co.*

W. L. C.

BYRNE J.

1903

July 28;
Aug. 4;
Nov. 12.

In re IBO INVESTMENT TRUST, LIMITED.

[00267 of 1902.]

Practice — Costs — Taxation — Company — Winding-up Petition — Order dismissing Petition — Costs of Contributories opposing — Copies of Evidence filed by Petitioner — Charges of Fraud against Contributories.

The common order dismissing a winding-up petition and giving to contributories opposing one set of costs does not include the usual charges consequent on taking copies of evidence filed by the petitioner and the company, even though serious charges of fraud are made in the petition against the contributories; if these extra costs are to be allowed, sufficient and special grounds must be shewn at the time the petition is dismissed, and a special direction must be given in the order.

Practice as to costs and position of contributories on a winding-up petition discussed.

SUMMONS to review taxation.

The question raised by this application was whether contributories, who had successfully opposed a winding-up petition, were entitled to recover from the petitioner the costs incidental to taking copies of the evidence filed by the petitioner in support of his petition, and by the company in opposition thereto.

The facts, so far as material, were as follows :—

In October, 1902, a petition for the compulsory winding-up of the above-named company was presented by a shareholder. The petition, which contained many charges of fraud with reference to the conduct of the company by its directors, with personal charges against some shareholders by name, was opposed by the company, by creditors, and by two sets of contributories, consisting of directors and non-directors.

On December 10, 1902, the petition was heard before Byrne J., who dismissed it with costs, and at the same time refused an application by the director contributories for a separate set of costs. The order dismissing the petition directed the petitioner to pay to the company and to the contributories opposing, their costs of the said petition to be

taxed, "but on such taxation only one set of costs is to be allowed between the said contributories opposing the said petition."

The registrar, in taxing the bill of costs of one set of contributories, disallowed the following classes of items: (1.) Payment for copies of evidence in support of the petition, in opposition thereto, and in reply. (2.) Perusals of such evidence. (3.) Copies of such evidence for counsel. (4.) Fees to counsel. Objections were taken to these disallowances on the following grounds: "The ground of the objection is that personal charges of fraud having been made against the contributories both in the petition and in the evidence in support thereof, and the magnitude of the interests involved, the contributories were entitled to defend themselves and their interests against the petitioner's personal attack on them, and it was impossible for counsel representing them to adequately oppose the petition without having the evidence in support of opposition and reply, and it was therefore necessary to take copies of such evidence and supply copies to counsel, and to mark an adequate fee to counsel with his papers.

"It is submitted that a petitioner is in the same position as a plaintiff in an action (see Annual Practice, 1903, vol. ii. pp. 450, 451), and where fraud is charged the persons against whom the charges are made are entitled to take copies of all evidence filed in support or opposition. The petition having been dismissed with costs, it is submitted that the taxing officer is in error in adopting the same principle of taxation as where costs are to be paid out of the assets and only allowing a nominal sum for successful contributories, the result of the taxation in this case being that the whole amount allowed is not sufficient to pay one of their junior counsel's fees, and that although one set of costs only has been allowed by the order, it should be a proper and a full bill."

The registrar's answer to the objections was as follows:—

"1, 2, 3, and 4. It is not the practice to allow contributories or creditors appearing on a petition the usual charges consequent on taking copies of the evidence filed by the petitioner and the company, unless for some reason such evidence has to be

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answered by, or is in answer to, evidence filed by such contributories or creditors, or unless some other sufficient grounds are shewn for the allowance of such charges. In this case allegations were made with reference to the conduct of the company by its directors, and the defence of such charges was undertaken by the company, all the evidence in answer to such charges being prepared and filed on behalf of the company, and the costs relating thereto have been allowed in the company's bill of costs. The hearing of a petition to wind up a company in which charges are made against it by reason of the act of its directors is not a proceeding like an action in which fraud is alleged against defendants, who have consequently to defend themselves, but the allegations are made against the company, and the company alone is respondent to the petition; the directors need not appear at all, and if they do it is not the practice of the Court to go into and adjudicate upon their conduct in the same way as it would were the Court trying an action in which the directors were defendants charged with fraud. I know of no case in which the winding-up judge has allowed directors appearing on a winding-up petition in which fraud was alleged any extra costs for defending their conduct as directors.

"It is the usual practice to allow them (if the petition is unsuccessful) a set of costs as contributories or a share in such sets of costs, as was done in this case. These directors applied at the hearing of this petition for a separate set of costs; but that was refused, and they were told they would get a share of the contributories' costs. Were contributories and creditors allowed the charges consequent on taking copies of evidence filed by the petitioner and company, there would be several sets of solicitors taking copies of the same evidence—clearly an extravagant practice. It is not usual for the contributories and creditors to answer such evidence, and they did not do so in this case. The petition itself nearly always contains sufficient information to enable contributories and creditors to decide whether they will support or oppose, and that is all they are required to do. It cannot be said that the petition in this case was deficient in such information.

"Wright J. long ago laid down the practice that he would not hear long speeches on behalf of contributories or creditors on the merits, but made them confine themselves to either supporting or opposing the petition. The fight is between the petitioner and the company.

"In this case the directors are represented by the same solicitors as the company. In accordance with the usual practice, their names ought to have been put on the company's brief: see *In re Brighton Marine Palace and Pier Co.* (1) When they applied for a separate set of costs and were refused, the judge intimated that as contributories they would get a share of the contributories' set of costs.

"It was not brought to the judge's attention (the official in Court not being aware of it at the time) that the same solicitor represented the company and directors, or doubtless the usual practice would have been followed, and the directors would then have had no share in the contributories' set of costs.

"The fact that the same solicitors represented the directors and the company was noticed when the order came to be settled; but, having regard to the judge's intimation when deciding the question of costs, the order was settled in accordance with such intimation.

"I have disallowed the objections."

A summons was thereupon taken out on behalf of the contributories asking for an order that the objections of the applicant to this taxation might be allowed, and that the matter might be referred back to the registrar to vary his certificate accordingly.

Gatey, for the summons. The objections already taken to this taxation are sufficient, and ought to be allowed on the grounds relied on therein. It is a question of principle, the point being, Are contributories, whether directors or only contributories, who are personally attacked in the petition, entitled to copies of the evidence filed in support of this attack? It is not possible for contributories to defend themselves against the charges brought against them unless they can see the

(1) W. N. (1897) 12 (3).

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evidence; they are bound for their own protection to take copies; and the costs of these copies ought to be allowed.

Buckmaster, K.C., and *Kirby*, for the petitioner. The Court on the hearing of a winding-up petition does not deal with charges made against directors or shareholders except in so far as they affect the question whether the case for a winding-up order is established. The only question before the Court is whether or not the company shall be wound up. The general rule as to the costs allowed to contributories has been found to work satisfactorily. Costs of evidence ought not to be allowed except under very special circumstances, in which case a special direction would be given in the order dismissing the petition; they certainly ought not to be allowed under the common order. The registrar here is right, and this application should be dismissed.

Gatey, in reply.

BYRNE J. (after stating the nature of the application and of the objection to the registrar's disallowances). Now the petition, as I have every reason to remember, was one which I do not think I should describe unfairly if I said that it was stuffed with charges of fraud against directors and contributories. Counsel for the petitioner in his discretion selected six charges of fraud, and certain portions only of the evidence relating to these charges were read; the whole of it was not gone into before the Court. The petition was dismissed. An application was made to me at the time to allow separate sets of costs for the director contributories appearing. I declined to do so, and only one set of costs was allowed in the ordinary form to the contributories opposing the petition. [After reading the order, and referring shortly to the facts as to the taxation, his Lordship continued:—] The learned registrar, in answer to the objections of the contributories, has justly pointed out that the proceeding by petition for winding up a company, in which charges are made against the directors, is not analogous as respects persons appearing on the petition (other than the company) to an ordinary action in which fraud is charged against the defendants. The case has to be made

out by the petitioner, and the defence to the petition has to be made out by the company, and the duty falls on the company to adduce evidence for that purpose.

In this case the contributories did what appears to me to have been the right thing to do—they made affidavits in support of the opposition by the company. As the company gets all the proper costs of the evidence furnished, and of all proper payments and charges in respect of giving evidence for the party to the litigation, anything ultra is a matter to be dealt with between the party taking the evidence and the witness giving the evidence.

When the case came on, the company did fight the case, they did oppose, and they opposed it with the evidence so furnished to them. The contributories and creditors may appear if they like upon the petition (at the risk, of course, of having to bear their own costs) for the purpose of expressing their approval or disapproval of the petitioner's application, and opposing or supporting it as the case may be; but, beyond that, any hearing by the Court of evidence in support of the merits of the case is, I apprehend, quite a matter of discretion.

I am told it was the practice of one of my predecessors never to allow parties so appearing to be heard upon the merits, but they were merely to be heard to say whether they supported or opposed. Now I lay down no general rule on the subject, but I want to point out that when a petitioner, in making a necessary allegation against the company to support his petition, had to make charges involving other persons, it would be a curious thing if those persons should have conferred on them the same rights as they would have had if they were defendants to an action brought against the company and themselves. The petitioner would have no right to get costs as against them, whereas they would, on the footing of allowing their contesting costs, be entitled, if the Court should so direct, to get costs against the petitioner. So I do not want to lay down any rule as to what the discretion of the Court may be in a matter of costs of persons appearing on the hearing of the petition; but I think it is

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clear that the common order does not give to contributories so appearing any other costs than those which the registrar is prepared to allow in the present case, and that if more is wanted it must be asked for at the time of the hearing of the petition.

In my judgment the reasons given by the learned registrar appear to be sufficient for the course he has taken, and I cannot accede to the demand for a review of the taxation, and I therefore dismiss the application with the usual result.

Solicitors: *Pritchard & Sons; Ashurst, Morris, Crisp & Co.*

W. C. D.

FARWELL J. 1903 *Nov.* 6.

In re GREYMOUTH POINT ELIZABETH RAILWAY AND COAL COMPANY, LIMITED. YUILL *v.* GREYMOUTH POINT ELIZABETH RAILWAY AND COAL COMPANY, LIMITED.

[1900 G. 2071.]

Company—Articles—Quorum of Directors—Resolution—Interested Director—Validity of Resolution

The articles of a company provided that any director might enter into a contract or be interested in any business with the company; that no director should vote on any matter relating to the contract or business with the company in which he was interested; and that two directors should be a quorum for the transaction of business:—

Held, that a quorum of directors meant a quorum competent to transact and vote on the business before the board; and, therefore, that a resolution passed at a meeting of three directors, two of whom were interested in the subject-matter of the resolution, was invalid.

ADJOURNED SUMMONS.

The above-named company was incorporated in March, 1893, under the Companies Acts, 1862 to 1890, with memorandum and articles of association. The material articles were the following:—

"104. Subject to the provisions of article 106, any director may enter into a contract with the company, or be interested

in any operation or business undertaken or assisted by the company. . . ."

"106. No director shall vote on any matters relating to the contract, operation, business, or office, with, in, or to which he shall be connected, interested, or appointed; and, if he does so vote, his vote shall not be counted."

"116. The directors may meet together for the despatch of business . . . . and determine the quorum necessary for the transaction of business: until otherwise determined, two directors shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes."

In 1894 the company, under a power in their articles, created a series of 90,000*l.* first mortgage debentures secured by a trust deed, and allotted and issued debentures to the aggregate amount of 88,800*l.*, leaving a balance of 1200*l.* unissued.

During 1897 the company was in financial difficulties, and advances amounting to 2069*l.* were made to the company by John and Joseph McDonald, two of the directors; and at a board meeting held on December 10, 1897, it was resolved that debentures to the value of 1200*l.* should be sealed and issued to John and Joseph McDonald in consideration of and part security for their said advances and a small further advance then made. The only directors present at this meeting were the two McDonalds and another director.

In October, 1900, the usual debenture-holder's action was commenced against the company, and a receiver and manager was appointed. In May, 1901, judgment was obtained, and certain accounts and inquiries were directed. It then transpired that no debentures had been issued to the two McDonalds under the resolution of December 10, 1897, and a summons was taken out by John McDonald and the executors of Joseph McDonald (who had died in 1900), claiming a declaration that they were entitled to rank as first mortgage debenture-holders of 1200*l.* pari passu with the other debenture-holders of 88,800*l.* It did not appear whether the two McDonalds had or had not voted on the resolution of December 10, 1897; but there was evidence that all parties had acted in good faith, and that the McDonalds had not pressed

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for the issue to themselves of the debentures for 1200*l.* because they thought that the resolution was a sufficient security for them.

Jenkins, K.C., and *Stokes*, for the plaintiffs in the action.

Mark Romer, for the summons. Assuming that the resolution was valid, the two McDonalds were in equity holders of debentures for the amount of their debt: *Pegge* v. *Neath and District Tramways Co.* (1) Next, the resolution was validly passed. It is immaterial whether the McDonalds did or did not vote, because, if they voted, their votes could not be counted. Either way, there was one director who could vote on the resolution and the necessary quorum of directors was present.

O. L. Clare, for opposing debenture-holders. The question really turns on the construction of art. 116. A quorum of directors for the despatch of business means a quorum competent to transact and vote on the business under consideration. Here there was only one director present who could vote, and therefore there was no valid quorum.

Vernon, for the trustees of the debenture deed.

FARWELL J. It is curious that there is no authority on the point raised by this summons; and, as the articles in question are in common form, the point is of some importance. I think that Mr. Clare's argument is well founded, and that the meaning of art. 116 is that the two directors to form the quorum for the despatch of business must be two directors who are capable of voting on the business before the board; otherwise it is idle. In the present case there were three directors present, and I take it that they voted for giving debenture security to two of themselves in consideration of a large sum of money then owing to the two directors, and a small sum of money then advanced or to be advanced. The giving of the security was a matter on which two of the directors could not vote under art. 106; and, moreover, if there had been otherwise a quorum, I think the other directors would have been justified in asking

(1) [1898] 1 Ch. 183.

them to retire while the question of giving them security was discussed, because they were interested against the company. Certainly it is a case in which the company is entitled to have the benefit of all the protection it can get from the independent directors. On the construction of the articles I think Mr. Clare's contention is right, and that the two directors were not capable of voting on the question, and, therefore, there was no quorum, and no valid contract for the issue of debentures to the two McDonalds. That disposes of the question.

Solicitors: *Parker, Garrett & Co.; Roy & Cartwright; Blyth, Dutton & Co.; Kimbers & Boatman.*

H. L. F.

OLDE *v.* OLDE.

[1903 O. 696.]

Vendor and Purchaser—Judgment for Specific Performance with Costs—Subsequent Failure by Purchaser to comply with Judgment—Vendor's Motion to rescind Contract—Form of Order—Costs—Practice.

Form of order in a vendor's action where judgment for specific performance with costs has been obtained and, the purchaser having subsequently failed to comply with the judgment, the vendor moves to rescind the contract and to stay further proceedings except for recovery of the costs of the action and motion.

THIS was a vendor's action for specific performance of a contract for the sale of land. The defendant had paid a deposit on account of the purchase-money. On July 4, 1903, the plaintiff obtained the usual judgment for specific performance with costs of the action to be taxed, &c. The master by his certificate dated August 4 certified that a good title had been made, and that the amount due to the plaintiff for the balance of the purchase-money was 961*l.* 18*s.* 5*d.* The defendant made default in payment of the balance of the purchase-money, nor did he pay the plaintiff's costs of the action which had been taxed. The plaintiff now moved for rescission of the contract with costs of the motion, and that all further proceedings might

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be stayed except such as might be necessary for recovery of the costs of the action already ordered to be paid and the costs of the motion—following the form of order made by Byrne J. in *Westerman* v. *Pantlin*, noted in Seton on Judgments, 6th ed. vol. iii. p. 2289.

Welby King, for the motion. The only question is whether the order is to follow the form in *Westerman* v. *Pantlin* or that in *Jeffery* v. *Stewart*. (1) In the latter case North J. held that the only order the Court could make was that the contract be rescinded, and all proceedings stayed, the defendant to pay the costs of the motion. It is submitted that if *Jeffery* v. *Stewart* (1) is followed, the effect will be that the plaintiff will lose the costs given when judgment was pronounced, as all proceedings will be stayed.

The defendant did not appear.

FARWELL J. I do not quite follow the decision of North J., but I think the difference is more a question of words than anything else. I will, however, adopt the form of the order made by Byrne J. in *Westerman* v. *Pantlin*.

Solicitor for plaintiff: *C. G. Algar*.

(1) (1899) 80 L. T. 17.

H. L. F.

BUCKLEY J.

1903 Nov. 11.

In re N. DEFRIES & CO., LIMITED. BOWEN *v.* N. DEFRIES & CO., LIMITED.

[1903 N. 520.]

Company—Debenture—Registration—Power of Company to cancel Unissued Debentures and to issue Fresh Debentures in their place—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 14, *sub-ss.* 1, 6.

A company which has power to exchange and vary its debentures, and has, in pursuance of an agreement to issue debentures as security for a loan, sealed but not issued or registered those debentures, can retain and cancel them and issue other debentures to the lender; and the other debentures, if registered within twenty-one days from the date when they were sealed, will be valid.

DEBENTURE-HOLDER'S ACTION.

On March 1, 1903, it was resolved at a meeting of the board of the defendant company to issue a series of first mortgage debentures to the amount of 5000*l.* It was proved that before the date of this meeting an agreement had been come to between the board and the plaintiff that he should have debentures to the value of 1000*l.* issued to him as security for 500*l.* which he was about to advance to the company—407*l.* in cash and the remainder by transfer of a debt due to him by a third person. This advance he made on March 2. Part of the series, which consisted of debentures for 25*l.* each, were sealed on March 16, but they were not issued, and on being tendered for registration it was said that the twenty-one days within which they were required to be registered under the Companies Act of 1900 had elapsed. At a meeting held on April 6 it was, with the consent of the holders of a former issue of debentures, resolved "that such debenture bonds be not issued, but retained by the company and cancelled, and that other bonds to be numbered from and after 193 be sealed in the form submitted to and approved by the board, and issued as to part in exchange or to be in exchange for debentures constituting a prior issue by the company, and as to the balance, 1000*l.*, part thereof, be issued to Mr. F. G. Bowen,

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and as to 3450*l.* to Mr. A. A. Moore as security for advances of 500*l.* and 1355*l.* respectively made by them to the company."

On April 7 forty debentures of 25*l.* each were sealed. These debentures were registered on April 11, and delivered to Mr. Bowen indorsed with the registrar's certificate under s. 14, sub-s. 6. The debentures were in the form of bonds; there was no covering deed; and the property charged was the whole undertaking and property of the company, including uncalled capital.

The money secured by the debentures became payable when resolutions for a voluntary winding-up were passed on April 17.

On May 26 an order was made for the compulsory winding-up of the company.

Mr. Bowen commenced this action on April 20, and it was by leave continued against the liquidator.

Under clause 23 of the memorandum of association the company had power "To borrow, or raise, or secure the payment of money in such manner as the company shall think fit, and in particular by the issue of debentures, or debenture stock, perpetual or otherwise, charged upon all or any of the company's property or assets (both present and future), including its uncalled capital"; and by art. 106, clause 22, the board were authorized "To cause or permit any debenture stock, bonds, debentures, mortgages, charges, incumbrances, liens or securities of or belonging to, or made or issued by the company, or affecting its property or any of the terms thereof, to be renewed, extended, varied, redeemed, exchanged, transferred, or satisfied as the board shall think fit, and to pay off and to reborrow the moneys secured thereby, or any part or parts of these moneys."

Levett, K.C., and *A. H. Jessel*, for the plaintiff. The only question is whether the debentures have been duly registered within s. 14 of the Companies Act, 1900, within twenty-one days from the creation of the charge. By the date of the creation of the charge is meant the date when the debenture-holder gets his security: s. 14, sub-s. 1; *In re S. Abrahams*

& Sons. (1) The evidence shews that before the meeting of March 1 there was an agreement between the company and the plaintiff that he should advance 500*l.* to the company and receive the debentures as security. He actually made the advance, partly in cash and partly in money's worth, and became entitled to but did not get his security. Under art. 106, clause 22, the company got rid of the debentures which had not been issued and created fresh debentures, which were given to the plaintiff indorsed with the registrar's certificate of registration. That is conclusive under s. 14, sub-s. 6. But, apart from that, the debentures were sealed on April 7, and were registered on April 11, within twenty-one days of their creation on the 7th. The board acted within their powers; the requirements of the Act have been complied with and the debentures are valid.

T. Eustace Smith, for the liquidator. The money was advanced and the charge created in equity on March 2, and the debentures were not registered within twenty-one days from that date.

[BUCKLEY J. The date at which the money was borrowed may be the date of the creation of the charge, but whether it is or not depends on the circumstances and the bargain between the parties.]

As soon as the bargain was concluded and the money advanced the plaintiff was entitled in equity to the security, and the charge was created.

[BUCKLEY J. If the promised debentures have not been issued, why cannot the company cancel them and issue and register within the proper time other debentures?]

It would be an evasion of the Act and against its spirit and intention. Sect. 15 actually provides for what is to be done in case a mistake has been made. If such transactions as this can be supported, s. 15 is unnecessary. The policy of the Act is that debentures should be registered.

[BUCKLEY J. The result of non-registration is that there is no security, and there is or may be a loss of priority, so that debts contracted by the company during the interval will stand

(1) [1902] 1 Ch. 695.

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first. But if the debentures have not been issued, why cannot fresh debentures be sealed, issued, and registered? It is a compliance with the original contract.]

The company would be giving a new charge in place of something which was void, so there would be no consideration. Such a series of securities is bad under the Bills of Sale Acts.

BUCKLEY J. stated the facts, and continued:—The only point argued before me is whether these debentures have been registered in time. If there was, as I think there was, an agreement on March 2 to give security, was it sufficient to register on April 11 a debenture issued in fact on April 7? In my opinion it was. The debentures which were first sealed under the agreement to give security were not registered within twenty-one days of the agreement. But the plaintiff does not rely on those debentures: they were never delivered to him. He says, "I had no security until on the 11th of April the debentures which I hold were registered and delivered to me in satisfaction of the bargain made on the 2nd of March. That is the security on which I rely." The fact that he did not get a security before that day does not shew that the agreement was void, but only that up to that time it had not been performed. It remained in force, and the security was given by the issue of debentures and registration on April 11. Mr. Bowen remained in possession of the agreement to give security, and was entitled to take the debentures which were sealed on April 7. The debentures are therefore good, and the plaintiff is entitled to the common order in a debenture-holder's action.

Solicitors: *Henry Moore; S. J. Woodham Smith.*

H. C. R.

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[1903 C. 1478.]

Charity—"Charitable Use"—Advowson—Application for Leave to Retain—Charity Commissioners' Consent and Appearance—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 17—*Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 5, 6, 8.

A testatrix who died on May 14, 1902, gave an advowson to such uses as her three sisters should within twenty-one years after her death appoint for the purpose of carrying out the express wish of her late husband that the advowson should be made over to and vested in the Church Patronage Trust by all lawful means. In February, 1903, the advowson was conveyed to the trustees of the trust, and it was thereby agreed that they and the persons deriving title under them should stand possessed of the advowson upon the trusts and subject to the powers comprised in and forming the 9th schedule to a deed of 1871 which governed the trust.

The trust declared by the schedule was to present to the vicarage and parish church from time to time "such fit and pious person of godly life and conversation, being in holy orders, capable of accepting and holding the same as the trustees for the time being . . . . should determine upon." By the same schedule a trustee was eligible for the appointment, and the trustees were required to be persons "well known or reputed to be of godly life and conversation" professing "themselves members of the Established Church of England and" "known to be zealously attached to the great principles of the Reformed Faith contained in the Liturgy and Articles of the said Established Church."

On May 12, 1903, the trustees issued an originating summons, applying, under s. 8 of the Mortmain and Charitable Uses Act, 1891, for the Court's sanction to the retention by them of the advowson. The Attorney-General was the only defendant to the summons. The summons was not heard until more than a year after the death of the testatrix:—

Held, (1.) that the Official Trustee of Charity Lands must be made a party to the proceedings, but that the Charity Commissioners were not necessary or proper parties.

(2.) That inasmuch as the trust did not require the trustees to do any more than duty required of any owner of an advowson—namely, to present a fit and proper person in holy orders, capable of accepting and holding the living—the advowson was not assured "to or for the benefit of any charitable use" within the meaning of s. 5 of the Act, and therefore s. 8 had no application to the case.

Semble, (*a*) that, where the trust imposed in respect of an advowson is to

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present clergymen of a particular type of religious thought in the Church of England there is a charitable trust.

(*b*) That a certificate of the Charity Commissioners under s. 17 of the Charitable Trusts Act, 1853, is not required in the case of an application under s. 8 of the Act of 1891.

MRS. LOUISA WOODCOCK, then the wife of the Rev. J. T. Woodcock, by her will, dated February 18, 1902, appointed her three sisters, below named, her executrixes.

By a codicil dated April 18, 1902, after reciting that since the date of the will her husband had died, and that she had derived certain real and personal property under his will and was desirous of disposing of the same, and after giving certain legacies, the testatrix made the following gift: "I devise the advowson and perpetual right of presentation to the vicarage of Battisford in Suffolk, which I derived under the will of my late husband, to such uses as my three sisters, Marianna Clayton Currie, Agnes Maria Moore, and Alice Josephine Muskett Cornell, or the survivors or survivor of them, shall within twenty-one years from the date of my decease appoint for the purpose of carrying out the express wish of my late husband that the said advowson should be made over to and vested in the Church Patronage Trust Society by all lawful means, but if the said society decline to accept the said patronage the said advowson and perpetual presentation shall belong to my said three sisters as joint tenants in fee simple."

The testatrix died on May 14, 1902, and her will was proved by M. C. Currie alone.

By an indenture dated February 14, 1903, and made between Walter Woodcock (surviving executor of J. T. Woodcock) and M. C. Currie of the first part, the three sisters of the testatrix (thereinafter called the appointors) of the second part, and the Rev. Sir John Robert L. E. Laurie and others (thereinafter called "the grantees") of the third part, reciting (amongst other things) that the grantees were the trustees of the society and desired to accept the patronage of the said advowson, it was witnessed that Walter Woodcock and M. C. Currie, as personal representatives, and by virtue of the powers conferred on them respectively by the Land Transfer Act, 1897, granted,

and the appointors appointed and confirmed unto the grantees and their heirs, the perpetual advowson and right of presentation of and in the vicarage of the church of Battesford, otherwise Battisford, in the county of Suffolk, with the appurtenances, to hold the same unto and to the use of the grantees, their heirs and assigns. And it was thereby agreed that the grantees and the persons deriving title under them should stand possessed of the advowson upon the trusts and subject to the powers so far as applicable comprised in and forming the 9th schedule to an indenture dated December 21, 1871 (the deed governing the society).

Sched. 9 of the deed of 1871 contained the following form of trust: "(1.) Upon trust that from time to time, as often as the said vicarage and parish church of —— shall become vacant by the death, resignation, deprivation, or cession of the incumbent or otherwise, the trustees for the time being of these presents do and shall nominate, appoint, and present to the same vicarage and parish church such fit and pious person of godly life and conversation, being in holy orders, capable of accepting and holding the same as the trustees for the time being of these presents, or the major part in number of them, shall determine upon. And do and shall perform all such other acts, deeds, matters, and things as shall or may be requisite for enabling such person to hold and enjoy the same vicarage and parish church of —— aforesaid. (2.) Provided always that it shall not be any objection to the person who may be appointed at any time to supply the vacancy for the time being of the said vicarage and parish church that he is one of the trustees for the time being of these presents."

Clause 4 of the same schedule provided "that only such persons shall be eligible to the office of trustees as shall be, or shall be well known or reputed to be, of godly life and conversation and shall profess themselves members of the Established Church of England, and shall be known to be zealously attached to the great principles of the Reformed Faith contained in the Liturgy and Articles of the said Established Church."

The grantees, as trustees of the Church Patronage Trust, on May 12, 1903, took out an originating summons, intituled

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in the matter of the trust and in the matter of the Mortmain and Charitable Uses Act, 1891 (1), and to which the Attorney-General was the only defendant, asking that the advowson with its rights, members, and appointments, "being required for actual occupation for the purposes of the charity," might be retained by the plaintiffs, and held by them upon the trusts of the Church Patronage Trust in accordance with the terms of the will and codicil and the deed of appointment. The summons was adjourned into Court and came on for hearing on November 4, 1903.

C. A. Montague Barlow, for the plaintiffs. The Church Patronage Trust dates from at least 1839. It is not a corporation, but various livings have been given to its trustees in trust to appoint clergymen to livings, and the intention of the trust was that clergymen of an Evangelical complexion should be appointed. That, however, is not shewn on the face of the trust as declared, which is contained in the 9th schedule to the deed of 1871. The qualification of the trustees of the trust is set forth in the fourth paragraph of the same schedule.

[BUCKLEY J. You have not made the Official Trustee of Charity Lands a defendant.]

(1) Sect. 3 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), provides that "land" is to include "tenements and hereditaments, corporeal or incorporeal, of any tenure."

Sect. 5: "Land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners."

Sect. 6: "So soon as the time limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the Official Trustee of Charity Lands, and the Charity Commissioners shall take all necessary steps for the sale or completion of the sale of such land. . . ."

Sect. 8: "It shall be lawful for the High Court, or any judge thereof sitting at chambers, or for the Charity Commissioners, if satisfied that land assured by will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity and not as an investment, by order to sanction the retention or acquisition, as the case may be, of such land."

The practice is only to make the Attorney-General defendant. The Charity Commissioners have expressed the view that the matter ought to be brought before the Court, but that a certificate of the Commissioners under s. 17 of the Charitable Trusts Act, 1853, is not required. (1)

[*R. J. Parker*, for the Attorney-General. It has never been decided, except possibly in chambers, whether the Commissioners' consent is required on an application under s. 8 of the Act of 1891, or whether when the year is over, as in this case, and vesting in the Official Trustee of Charity Lands has taken place under s. 6 of the Act of 1891, the application ought not to be made to the Commissioners.

BUCKLEY J. Am I not being asked to authorize the retention of the advowson by persons in whom it is not vested? If the year is over, the advowson has vested in the Official Trustee of Charity Lands. Ought he not to be joined as a respondent?]

There is a question, no doubt, whether it is not vested in him. But the summons was issued within a year after the death of the testatrix, and therefore the time does not run against the plaintiffs: *In re Ryland*. (2) In the same case Byrne J. left open the question whether, after the property has vested in the official trustee the Court or the Commissioners can still enlarge the time.

If an application—e.g., an appeal—is entered within the prescribed time that is sufficient, although the application is not heard by the Court until after the time has expired: *Reg.* v. *London Justices*. (3)

There is, however, the difficulty that the Charity Commissioners are not here.

BUCKLEY J. The person you will have to join is the Official Trustee of Charity Lands, not the Charity Commissioners.

(1) The Commissioners also stated that in view of the judicial opinion expressed in *Hunter* v. *Attorney-General*, [1897] 1 Ch. 518, [1897] 2 Ch. 105, and [1899] A. C. 309, they felt some doubt whether the advowson could properly be deemed to have been devised "to or for the benefit of any charitable use," a necessary condition to the exercise by them of jurisdiction under the Act of 1891.

(2) [1903] 1 Ch. 467, 473.

(3) [1903] 2 Q. B. 476.

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[The hearing was accordingly adjourned, and the official trustee and also the Charity Commissioners were joined as parties.]

Nov. 18. *Vaughan Hawkins*, for the Official Trustee of Charity Lands. There has been some misapprehension as to whether the Charity Commissioners should appear. It is not the practice for them to do so, and I take it that the Court will agree that the Commissioners, who are a semi-judicial body, should not actually appear.

BUCKLEY J. No. I want the person in whom it may be said that under the Act the advowson has vested, that is, the Official Trustee of Charity Lands.

C. A. Montague Barlow. Legally he may have the estate, but if it is a question of any revesting order being made or consented to, that consent would have to be given by the Charity Commissioners.

BUCKLEY J. I should not bring them here as litigants for that purpose. They are not necessary parties, and their names should be struck out.

[The arguments then proceeded.]

Barlow, for the plaintiffs. Sched. 9 of the deed of 1871 requires no particular religious complexion as the qualification of any clerk to be presented, except as pointed out with reference to the trustees, one of whom may be presented. The trust indicated is a charitable trust, because it is a trust in effect to secure a better presentation than would be procured under normal circumstances. An advowson vested in trustees for the benefit of the parish, when the vicar was chosen by the parishioners, was held to be charity property: *In re St. Stephen, Coleman Street.* (1)

[BUCKLEY J. The key-note of the judgment is in the passages at pp. 500, 501 of the report from the judgments of Lord Selborne and Lord Cairns in *Goodman* v. *Saltash Cor-*

(1) (1888) 39 Ch. D. 492.

poration. (1) Lord Selborne said: "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town . . . . is a charitable trust"; and Lord Cairns: "Such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say a public trust or interest, for the benefit of the free inhabitants of ancient tenements."]

It is not a charitable trust only where the trust is for a parish; an advowson held generally to be administered for the presentation of fit and proper persons would be a charity. One instance of a charitable trust is afforded by *Attorney-General* v. *Bishop of Litchfield* (2), where the gift was of "the donation and parsonage of the rectory of Womborne and chapel of Trysall" to eight persons and their heirs by a testator who "desired their care to present a learned, painful, preacher, honest in life and conversation, to the said living, as often as it should be void; whereby souls may be gained to Christ."

[BUCKLEY J. The question whether there was a charitable trust did not arise there; the only question was, who was entitled to present?]

This trust gives an additional remedy. In an ordinary case no action would lie against the patron for presenting an improper person. Here an injunction or other remedy might be obtained against the trustees, and the parishioners therefore get a double safeguard in the veto of the bishop and the injunction of the Court.

R. J. Parker, for the Attorney-General. Normally it is for the Attorney-General to support any gifts for charitable purposes, but in the present case there is no one before the Court to contend that this is not a charity, and it seems to be my duty to point out the difficulty of construing this trust as a charitable trust. It is the duty of every person who has an advowson to present a fit and proper person, and therefore the trusts of this deed do not enlarge the common law obligation of the owner of an advowson. In *In re Hunter* (3) Romer J. said: "Whoever holds an advowson or presentation is bound

(1) (1882) 7 App. Cas. 633, 650. (2) (1801) 5 Ves. 825.
(3) [1897] 1 Ch. 518, 522.

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on a vacancy to present a fit and proper clergyman of the Church of England."

[BUCKLEY J. He went further by saying, "And I cannot see what charity it can be to try and get advowsons or presentations into the hands of particular persons likely only to select from a special class of the clergymen of the Church of England."]

In the Court of Appeal (1) it was held that an intention was shewn to devote the property to the advancement of Evangelical views, and that the property was given for charitable purposes. In the House of Lords in the same case, *Hunter* v. *Attorney-General* (2), it was held that there was no trust charitable or otherwise; but the observations of Lord Davey shew that he assumed that there would be a good charitable trust of an advowson if it was to present persons of a particular type of thought. But here there is no charitable trust either in favour of the inhabitants of a parish or class of the public, or for the encouragement of a particular type of religious thought. The trust is simply to do what the law implies that every patron will do, and the only possible ground for contending that the trust is charitable is that the trustees are required to hold certain views. That limits to a certain extent the persons who may hold the particular advowson; for advowsons may be held by some persons who are not members of the Church of England.

Vaughan Hawkins, for the Official Trustee of Charity Lands. I do not know of any further authority or argument tending to shew that the trust is a charitable trust, and I can only say that the official trustee submits to the Court, and that if the Court holds that the trust is a charitable one, the Charity Commissioners will know how to act.

Barlow, in reply.

BUCKLEY J. This is a summons under the Mortmain and Charitable Uses Act, 1891, asking for an extension of the time during which property may be retained having regard to the provisions of that Act. The question I have to determine is

(1) [1897] 2 Ch. 105. (2) [1899] A. C. 309.

whether there is any charitable trust within the Act. If there is not, I have no jurisdiction under the Act. In my judgment, there is not here any charitable trust. [His Lordship stated the material parts of the codicil and the deed of February 14, 1903, and continued:—] The deed of December 21, 1871, referred to in the deed of appointment, is a deed governing the affairs of the Church Patronage Trust. So far, therefore, I have a deed of appointment which I must read into the codicil, and the joint effect of the two is that the testatrix has devised to the persons who thus become appointees. They are to hold upon the trusts set forth in the 9th schedule to the deed of 1871. I am unable to find in the first clause of that schedule any direction to do anything further or other than what the owner of any advowson is bound to do. He ought to present a fit and pious person of godly life, who is in holy orders, and capable of accepting and holding the living. There is no trust expressed other than such as is involved in the duty of any owner of an advowson.

If I turn to clause 4 of the schedule, I find there a definition or indication of the class of persons who are to be trustees. Assuming, although I do not think it is the case, that I could evolve from that description of the character of the trustees that they were bound to appoint a person of the particular religious persuasion which is pointed out by that clause, I do not find that any class of thought in the Established Church of England is there defined or pointed to. The trustees are simply to be persons of godly life, members of the Established Church of England, and attached to the principles of the Reformed Faith contained in the Liturgy and Articles of the Established Church.

In other words, the trustees, according to this definition, must be people of such religious convictions as the person to be presented to the living must be. He must be a member of the Church of England, and the trustees must be members of the Church of England.

There is no occasion that the trustees should be of any particular class of thought in the Church of England. Therefore, I cannot get out of that clause, even if I could under any

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circumstances do so, any indication that the person to be appointed to the living must be of any particular type of religious conviction included within the pale of the Church of England. Under these circumstances, is there any charitable trust? I think not. There may be a charitable trust of an advowson; there is no question about that after the decision of the House of Lords in *Hunter* v. *Attorney-General.* (1) Thus, for instance, an advowson may be held upon a charitable trust if it be held for the inhabitants of a particular parish, as decided by Kay J. in *In re St. Stephen, Coleman Street.* (2) Again, the advowson will be the subject of a charitable trust if it is held upon trust to present from time to time a person who holds a particular type of religious thought in the Church of England. I say that for this reason. Romer J. in *In re Hunter* (3) was of opinion that that was not so; but the Court of Appeal (4) took a different view, and thought that a gift for the purpose of spreading particular religious views was a good charitable trust. In the House of Lords the decision of the Court of Appeal was reversed and that of Romer J. was restored; but upon the point with which I am here concerned the House of Lords did not differ from the Court of Appeal. Lord Davey, without deciding the point, assumed that in this the Court of Appeal were right. He says (5): "I assume, for the purposes of this case, that, if applicable to the first purpose, there would be a good charitable trust. The first is that only such churches or chapels shall be subscribed or contributed to wherein the service shall, in the opinion of the special trustees, be conducted in the particular manner prescribed." If, therefore, I could find here that the trustees were always to present a person of a particular type of religious thought, I should follow the Court of Appeal, and hold that there was a good charitable trust. But I am unable to find it. The trusts indicated are only that the persons who are the owners of the advowson shall do that which every owner of an advowson ought to do, namely, present a fit and proper

(1) [1899] A. C. 309.
(2) 39 Ch. D. 492.
(3) [1897] 1 Ch. 518, 522.
(4) [1897] 2 Ch. 105.
(5) [1899] A. C. 321.

person ordained in holy orders in the Church of England competent to hold preferment in that church. That is no indication of any charitable trust, and I hold that there is no charitable trust here. I arrive at this conclusion with more confidence because at my instance the Official Trustee of Charity Lands has been brought here and appears by Mr. Vaughan Hawkins. It would be his duty to argue that this was a charitable trust if he could do so; but, although he is willing to assist the Court to the utmost of his power, he is unable to refer me to any case in which such a gift as this has been held to constitute a charitable trust. I think, therefore, that the summons fails. It does not come within the Act, and I dismiss it.

[The Attorney-General not asking for costs, the only order as to costs was that the plaintiffs should pay the costs of the Official Trustee of Charity Lands, whose counsel stated that he had no fund out of which to pay them.]

Solicitors for plaintiffs: *Bridges, Sawtell & Co.*

Solicitor for Attorney-General and the Official Trustee of Charity Lands: *The Treasury Solicitor.*

F. E.

JOYCE J.
1903
Nov. 19.

In re WILLIAMS.
HOLDER *v.* WILLIAMS.

[1902 W. 2198.]

Administration—Retainer—Personal Representative—Real Representative—Right to retain out of Real Assets—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, *sub-s.* 3.

Part I. of the Land Transfer Act, 1897, which establishes a real representative by vesting the real estate of a deceased person in his personal representative, and provides for the administration of real estate in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents as if it were personal estate, does not confer any new right of retainer or priority in favour of the personal representative as against real assets.

ADJOURNED SUMMONS.

This was a creditor's action for the administration of the estate of Henry Williams, who died intestate on May 13, 1902.

On May 31, 1902, letters of administration were granted to the defendant, who was the widow of the intestate.

The estate was insolvent.

On March 19, 1903, the defendant took out the present summons, asking (1.) that she might be at liberty to complete a contract which she had entered into for the sale of the intestate's real estate for the sum of 1000*l.*, and of certain goods and chattels in or about the premises for the sum of 306*l.*; and (2.) that it might be declared that she was entitled out of the balance of 79*l.* 9*s.* 6*d.* in her hands, or out of the said respective sums of 1000*l.* and 306*l.*, or any other moneys, goods, and effects which might come to her hands as administratrix, to retain the sum of 600*l.* due to her from the intestate's estate in priority to the other creditors of the estate.

It appeared that in May, 1901, the defendant had lent the sum of 600*l.* to her husband for the purposes of his business, and it was this debt which she now claimed to retain.

The question was whether she was entitled to retain it as against the proceeds of sale of the real estate.

The question turned upon ss. 1 and 2, sub-s. 3, of the Land Transfer Act, 1897. (1)

Hughes, K.C., and *W. Howland Jackson*, for the defendant. Under the law as it stood before the passing of the Land Transfer Act, the legal personal representative was entitled to retain his own debt out of the "legal assets." By the operation of the Act real estate is now made legal assets, and the right of retainer applies: Carson on Real Property Statutes, p. 408. By the Act the personal representative is now constituted the real representative as well, and is entitled, therefore, to retain out of the proceeds of real estate. Real estate is now in the same position as personal estate for the purpose of the exercise of the right of retainer. The defendant is entitled to retain: *In re May*. (2) The proviso at the end of sub-s. 3 does not affect the right of retainer, as the order is not altered in which the real and personal estate respectively are applicable towards the payments therein mentioned. The word "respectively" means, as between real and personal assets—that is, relatively the one to the other.

Younger, K.C., and *P. F. Wheeler*, for the plaintiff in the action. There is nothing in the Land Transfer Act, 1897, to extend the right of retainer to real estate. The right has always been considered to be an anomalous and unjust right which is not to be extended except by very express language:

(1) Sect. 1 of the Land Transfer Act, 1897, provides that, "Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

Sect. 2, sub-s. 3, provides as follows: "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies."

(2) (1890) 45 Ch. D. 499.

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Crowder v. *Stewart.* (1) In *In re Jones, Calver* v. *Laxton* (2), the operation of Hinde Palmer's Act with regard to the right of retainer was considered, and it was there held that the order of payment was not affected by that Act so as to give incidentally to an executor the power to defeat specialty as well as simple contract creditors. The question which now arises under the Land Transfer Act is similar. The object of that Act is to create a "real representative." *In re Jones, Elgood* v. *Kinderley* (3), in which it was held that the Land Transfer Act, 1897, does not make any difference in the hitherto established practice as to costs in an ordinary action for administration of real and personal estate, does not, of course, cover this case, but it shews an intention not to alter previously existing rights as between personalty and realty.

Of the authorities decided before the Act, *Bain* v. *Sadler* (4) shews that an executor cannot have in one capacity rights over property which he acquires in another. See also *In re Illidge* (5), where it was held that an heir-at-law or devisee had no right of retainer, out of the proceeds of real estate, for a debt due to him on simple contract from the testator or intestate. The personal representative is now only placed in the position of the heir-at-law for the purposes of administration, and it is not intended to extend the rights which, as personal representative, he previously had.

The proviso in s. 2, sub-s. 3, is conclusive. If the defendant's contention is correct, a claim would be allowed which would not have been admissible before the Act; consequently the order in which the real and personal assets respectively were applicable before the Act would be altered or affected. It could not have been the intention of the Legislature by this Act to effect such an alteration, and thus incidentally to extend what has been called an injustice and inequality.

[They also referred to Brickdale and Sheldon on the Land Transfer Act, p. 234.]

(1) (1880) 16 Ch. D. 368.
(2) (1885) 31 Ch. D. 440.
(3) [1902] 1 Ch. 92.
(4) (1871) L. R. 12 Eq. 570.
(5) (1884) 27 Ch. D. 478.

Hughes, K.C., in reply. It is said that the right of retainer is an anomalous right, but if this claim were not allowed the position would give rise to a greater anomaly. The foundation of the rule allowing retainer is pointed out by Cotton L.J. in *In re Illidge* (1), namely, that the executor who was also a creditor could not sue himself, and therefore, without the power to retain, he was in an inferior position to the other creditors, who could sue him and obtain priority by getting judgment. Under the Act the real estate is vested in the legal personal representative, and he is liable to be sued in respect of it. It would, therefore, certainly be anomalous to say that he has no right of retainer. A new burden would be thrown upon him, while the corresponding advantage would be taken away.

JOYCE J. This summons raises an important and interesting question.

The first part of the Land Transfer Act, 1897, intituled "Establishment of a real representative," vests the real estate of a deceased person in his personal representative as thereby provided. The present case is one of an administratrix, and, the deceased being indebted to her, it is contended on her behalf that she is entitled to retain out of the proceeds of sale of the real estate belonging to the intestate a sufficient sum to pay the debt which is due to her in preference to the other creditors. That is a somewhat startling proposition, bearing in mind what has been said by various judges, and in particular by Malins V.-C. in the case of *Crowder* v. *Stewart* (2), upon the subject of retainer, namely, that "the right of retainer is a relic of old law, not founded on justice, and working the greatest possible injustice." There is no doubt about the truth of that. But I have to consider the terms of the Land Transfer Act, and if their necessary effect is to give to the personal representative this extended right of retainer she must have it.

The object of the first part of the Act was to establish a real representative, and I can find nothing express in the title or any part of the statute to the effect that there is to be any extension or alteration of the rights of an executor or administrator with

(1) 27 Ch. D. 478. (2) 16 Ch. D. 368.

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reference to retainer. It appears to me that primâ facie the object of the first part of the Act—the only part that is relevant—was, speaking generally, to simplify and improve the machinery for the administration of real assets without altering in any manner the ultimate rights of the persons beneficially interested in the proceeds of such assets.

I agree with what was said by Kay J. in *In re Jones, Calver* v. *Laxton* (1), namely, that "the right of retainer, as it produces inequality, is never assisted"; and I do not think that a statute, the object of which is to establish a real representative by vesting the real estate of the deceased in the personal representative, should be construed to give incidentally to such representative a new right of retainer or priority unless I am compelled so to determine. Now, am I compelled to hold that the extended right of retainer claimed in the present case has been conferred by the first part of the Land Transfer Act? I think not. For it appears to me, after some consideration, that there is a comprehensive overriding proviso at the end of s. 2, sub-s. 3, which prevents the right of retainer contended for being successfully claimed. [His Lordship read the proviso, and continued:—]

That enactment, omitting immaterial words, provides that nothing in the Act contained shall alter or affect the order in which real assets are now applicable in or towards the payment of debts. By real assets I understand the several kinds of real assets, e.g., real estate belonging to the deceased, and real estate appointed under a general power, and there are other differences and distinctions. And by debts I understand the different species of debts, as, for instance, debts due to the Crown, or other preferential liabilities and debts due to the legal personal representatives and other persons respectively. To introduce a new right of retainer or priority in favour of the personal representative as against real assets would in my opinion be to alter, or at least affect, the order in which real assets were, previous to the statute, applicable in or towards the payment of debts. Therefore, upon this short ground—although there are other arguments against the defendant's contention

(1) 31 Ch. D. 447.

well worthy of consideration if need be—I hold that she is not entitled to any such right of retainer as claimed against real assets.

Solicitors for defendant: *Badham & Comins, for Brookes & Badham, Tewkesbury.*

Solicitors for plaintiff: *Jackson & Jackson, for Heath & Eckersall, Cheltenham.*

G. A. S.

GARNER *v.* MURRAY.

[1900 G. 1415.]

Partnership—Dissolution—Losses and Deficiencies of Capital—Final Settlement of Accounts—Distribution of Assets—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-s.* 1; *s.* 44.

G., M. & W. went into partnership under a parol agreement that the capital of the business should be contributed by them in certain unequal shares, but that profits should be divided equally. Upon a dissolution, after satisfying all liabilities to creditors and the advances of two of the partners, the assets were insufficient to make good the capital. A considerably larger sum was due in respect of capital to G. than to M.:—

Held, that, having regard to s. 44 of the Partnership Act, 1890, the true principle of division of assets was for each partner to be treated as liable to contribute an equal third share of the deficiency, and then to apply the assets in paying to each partner rateably what was due to him in respect of capital.

FURTHER CONSIDERATION.

In 1900 the plaintiff entered into partnership with the defendants Murray and Wilkins upon the terms that the capital of the business should be contributed in certain unequal shares, and that each partner should be entitled to one-third share of the net profits. By an order dated May 14, 1901, the partnership was dissolved as from June 30, 1900.

It appeared from the master's certificate (as varied) that at that date there was due to the plaintiff, in respect of capital, the sum of 2500*l.*, and in respect of advances made by him to the firm the sum of 266*l.* 16*s.* 10*d.*; that there was due to the defendant Murray in respect of capital the sum of 314*l.* 3*s.* 4*d.*, and in respect of advances the sum of 147*l.* 9*s.* 8*d.* It also

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appeared that when all the liabilities of the firm should have been satisfied, including the debts due from the firm to the partners in respect of advances, the assets would be insufficient to repay the capital by the sum of 897*l.* 3*s.* 8*d.* It was alleged that nothing could be recovered from Wilkins.

There was standing in court to the credit of the action a sum of 764*l.* 9*s.* 4*d.*, and the question now arose, upon the further consideration of the action, how this sum was properly distributable.

In the course of the hearing it was agreed that the costs of the action, not including certain specified costs, should be borne and paid by the plaintiff and the defendant Murray in equal shares.

Younger, *K.C.*, and *W. H. Cozens-Hardy*, for the plaintiff. Where one partner has contributed more capital than another and there is a deficiency of assets, in distributing the assets upon a dissolution the partner who has contributed more is entitled to be paid first the difference between his contribution and that of his partner: *Ross* v. *White* (1); Seton on Judgments, 6th ed. vol. iii. p. 2171. There the contributions were originally equal, but had become unequal by reason of the different amounts drawn out by the partners. There is no distinction in principle between that case and the present. Before the defendant Murray can receive anything, the plaintiff's loss of capital must be reduced to an equality with that suffered by Murray. The rule in such a case is to begin by equalising the loss of capital as between the partners: Lindley on Partnership, 6th ed. p. 601, where, in dealing with a case like this, when partners have advanced or agreed to advance unequal capitals and to share profits and losses equally, it is said that "a deficiency of capital must be treated like any other loss, and the assets remaining after payment of all debts and advances must be distributed amongst the partners so as to make each partner's loss of capital equal." Under s. 24, sub-s. 1, of the Partnership Act, 1890, all the partners "must contribute equally towards the losses whether

(1) [1894] 3 Ch. 326.

of capital or otherwise sustained by the firm"; and by s. 44 (*a*), "Losses, including losses and deficiencies of capital, shall be paid . . . . if necessary, by the partners individually in the proportion in which they were entitled to share profits"—i.e., in this case, equally.

[They also referred to *Binney* v. *Mutrie* (1), *Nowell* v. *Nowell* (2), *Wood* v. *Scoles* (3), and *In re Hodge's Distillery Co.* (4)]

Hughes, K.C., and *Hon. F. Russell*, for the defendant Murray. The word "rateably" in s. 44 (*b*), sub-s. 3, involves the assumption that all the contributions have not been paid up in full. If the assets are not sufficient to pay every one in full, the partners are to divide them rateably. The true principle of division in this case is for each partner to contribute to the assets an equal share of the deficiency of capital, and then to divide the whole rateably between them. The deficiency of capital is 897*l.* 3*s.* 8*d.* Of that sum each partner must contribute to the assets one-third, i.e., 299*l.* 1*s.* 3*d.* The defendant Wilkins' share of the deficiency being irrecoverable, there will not be enough to recoup the capital entirely, and the available assets must be divided rateably between the plaintiff and the defendant Murray in proportion to the amounts due to them in respect of capital. If it be material to cite cases decided before the Partnership Act, then we submit that *Binney* v. *Mutrie* (1) and *Wood* v. *Scoles* (3) support our contention.

In *Ross* v. *White* (5) the question was how costs were to be borne. Costs are not in dispute in this case, and that authority has no application.

Younger, K.C., in reply.

JOYCE J. The real question in this case is how, as between two partners, the ultimate deficit, which arises in the partnership assets from the default of a third partner to contribute his share of the deficiency of the assets to make good the capital, is to be borne by them. We have now in the Partner-

(1) (1886) 12 App. Cas. 160, 165.
(2) (1869) L. R. 7 Eq. 538.
(3) (1866) L. R. 1 Ch. 369.
(4) (1870) L. R. 6 Ch. 51.
(5) [1894] 3 Ch. 326.

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ship Act, 1890, a code which defines the mode in which the assets of a firm are to be dealt with in the final settlement of the accounts after a dissolution.

Sect. 44 is plain. [His Lordship read the section, and continued:—] I do not find anything in that section to make a solvent partner liable to contribute for an insolvent partner who fails to pay his share. Sub-s. (*b*) of s. 44 proceeds on the supposition that contributions have been paid or levied. Here the effect of levying is that two partners can pay and one cannot. It is suggested on behalf of the plaintiff that each partner is to bear an equal loss. But when the Act says losses are to be borne equally it means losses sustained by the firm. It cannot mean that the individual loss sustained by each partner is to be of equal amount.

There is no rule that the ultimate personal loss of each partner, after he has performed his obligations to the firm, shall be the same as or in any given proportion to that of any other partner. I have to follow the Act, and I see no difficulty in doing so in this case. The assets must be applied in paying to each partner rateably what is due from the firm to him in respect of capital, account being taken of the equal contributions to be made by him towards the deficiency of capital.

There is not in my opinion anything in the authorities cited or in the passage in Lindley on Partnership, to which reference has been made, that is inconsistent with the result which I have stated.

Solicitors for plaintiff: *Crowders, Vizard & Oldham, for William Warman, Stroud.*

Solicitors for defendant Murray: *Balfour Allan & North.*

G. A. S.

Ex parte MIDLAND RAILWAY COMPANY.

C. A. 1903 Dec. 1.

[1903 M. 058.]

Railway Company—Entry on Land before Determination of Purchase-money —Deposit of Estimated Value—Bond—Payment out of Deposit to Company—Evidence—Delivery up of Bond—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 85, 86, 87, 124.

When under s. 85 of the Lands Clauses Consolidation Act, 1845, a railway company have entered into possession of land which they are authorized to take, giving a bond to the person who claims to be entitled to the land and depositing money in court as provided by that section, the company, having satisfied the conditions of the bond and shewing that it has been delivered up to them, are entitled, upon a petition by themselves and the obligee of the bond, to have the money deposited repaid to them, without proving that the purchase-money of the land has been paid to the persons really entitled to it.

The rights of any person, other than the obligee of the bond, having an interest in the land are protected by s. 124 of the Lands Clauses Consolidation Act.

Decision of Kekewich J. reversed.

APPEAL by the above company from the refusal of Kekewich J. to order the payment to the company of a sum of money which had been deposited by them in court under s. 85 of the Lands Clauses Consolidation Act, 1845. (1)

In 1895 Mary Ann Bailey, widow, was, as trustee of the will of Robert Shelley, deceased, the owner of the legal estate in some freehold land at Alfreton, in Derbyshire, which the company by their special Acts, with which the Lands Clauses Consolidation Act was incorporated, were authorized to take for the purposes of their undertaking. Mrs. Bailey claimed to be entitled as trustee to sell and convey the land in question to the company, though, as was afterwards discovered, she had not a power of sale.

The company, having given notice to treat to Mrs. Bailey and being desirous of entering on the land before the purchase-money or compensation to be paid by them had been

(1) Vide W. N. (1903) 99.

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determined by agreement or otherwise, deposited in the Bank of England, pursuant to ss. 85 and 86 of the Lands Clauses Consolidation Act, by way of security, to the account of the Paymaster-General, "Ex parte the Midland Railway Company, the account of Mary Ann Bailey as trustee under the will of Robert Shelley," the sum of 100*l*. This sum had been determined by a surveyor, appointed pursuant to the Railway Companies Act, 1867, to be the value of the estate and interest in the land which Mrs. Bailey claimed to be entitled to sell to the company. The company also, pursuant to s. 85 of the Lands Clauses Consolidation Act, gave to Mrs. Bailey a bond dated November 27, 1895, under their common seal, with two sureties in the penal sum of 100*l*., as provided by s. 85.

The bond contained a recital that the company required to take for the purposes of their undertaking the land and hereditaments described in a schedule, and that Mrs. Bailey "is or claims to be entitled" under the provisions of the company's Acts "to sell and convey the said land and hereditaments to the company." The condition of the bond was as follows:—

"Now the condition of the above-written bond or obligation is such that if the company shall pay unto the said Mary Ann Bailey, or deposit in the Bank of England for the benefit of the parties interested in the said land and hereditaments, as the case may require, under the provisions contained in the said Lands Clauses Consolidation Act, 1845, all such purchase-money or compensation as may in manner in the same Act provided be determined to be payable by the company in respect of the same land and hereditaments, together with interest thereon at the rate of five pounds per cent. per annum from the time of entering on such land and hereditaments until such purchase-money or compensation shall be paid to the said Mary Ann Bailey, or deposited in the bank for the benefit of the parties interested in the said land and hereditaments, under the provisions in the said Act contained; then the above-written bond or obligation to be void, otherwise to remain in full force."

The purchase-money to be paid by the company for the

land was afterwards fixed by agreement between them and Mrs. Bailey and the persons beneficially entitled to the land at the sum of 110*l.*; and on September 29, 1898, Mrs. Bailey and the beneficiaries executed a deed conveying the land to the company in fee, the purchase-money being paid by the company to the beneficiaries in the proportions in which they were entitled to it, together with interest from the time when the company had entered upon the land.

Upon the execution of the conveyance the bond was delivered by Mrs. Bailey to the company.

A petition was presented by the company and Mrs. Bailey asking that the sum of 100*l.* deposited in the bank and a sum of cash representing interest thereon might be paid out to the company. By the same petition the company also asked for payment to them of some other sums which had been deposited under similar circumstances in respect of other lands on which they had entered, the vendors of those lands also joining in the petition; but it is unnecessary to state the facts relating to those other sums.

The petition was not served on any one.

Kekewich J. refused to make the order asked for in Mrs. Bailey's case. He said that the money was deposited in the bank "by way of security to the parties whose lands shall have been entered upon for the performance of the condition of the bond." The fund was a security for the parties whose lands had been entered upon, and here the persons whose land had been taken were—not Mrs. Bailey, but the persons whom she represented. There ought to be some evidence that the assessed purchase-money had been paid to the persons entitled to receive it.

The company and Mrs. Bailey appealed.

Neville, K.C., and *J. K. Young*, for the appellants. It is submitted that when the condition of a bond, given under s. 85 of the Lands Clauses Consolidation Act, has been satisfied by payment by the company of the amount of the purchase-money, determined as provided by s. 85, to the person to whom the bond has been given, and the bond has been delivered up to

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the company, the company are entitled to have the money deposited by them repaid to them. The company are not bound to satisfy the Court by further evidence that the persons really entitled to the land have been paid; the production of the bond and the concurrence of the person to whom it was given are sufficient: *Re London and North Western Ry. Co.* (1); *Martin* v. *London, Chatham and Dover Ry. Co.* (2); *Ex parte Midland Ry. Co.* (3) This is the view which has been taken by the text-writers: Seton on Judgments, 6th ed. vol. iii. p. 2455; Browne and Theobald on Railways, 3rd ed. p. 215. And it is believed that the practice has hitherto been in accordance with this view. The company do not obtain a statutory title to the land, and, if any interest in it has been by mistake overlooked, s. 124 of the Lands Clauses Consolidation Act applies, and the company will have to purchase that interest. It is submitted that when the company have satisfied the obligation of the bond they are entitled to have the money deposited repaid to them. The deposit is made only for the security of the person to whom the bond is given. No one else has any lien on the money: *Martin* v. *London, Chatham and Dover Ry. Co.* (2)

[ROMER L.J. Suppose the company could not discover any one claiming to be entitled to the land?]

It may be doubtful whether s. 85 would apply to such a case. But here there was a person who claimed to be entitled, and the bond was given to her.

LORD ALVERSTONE C.J. It must be taken that the persons to whom bonds under s. 85 of the Lands Clauses Act were given by the company are represented or concur in the application of the railway company that the money deposited by them at the time of the execution of the bonds should now be paid out to the company. Kekewich J. seems to have thought that that concurrence would not be sufficient to justify the Court in ordering the payment out, but that the Court ought to inquire whether the persons so concurring were really those to whom

(1) (1872) 26 L. T. 687. (2) (1866) L. R. 1 Ch. 501.
(3) W. N. (1894) 38.

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the land belonged and to whom the compensation money was rightfully paid.

I think the mistake (if I may respectfully say so) into which the learned judge has fallen is that he has overlooked the condition of the bond and the circumstances under which the bond was given. I am giving no opinion as to what the result would be in any case in which there was a bond differently framed or in which a company may have entered on land under the powers of s. 85, the persons whose interests were to be protected not being then known, so that they could not be made parties to the bond. [His Lordship read the condition of the bond, and continued:—]

If one keep in view the circumstances, it is I think quite plain that when the ascertained compensation money has been paid by the company—that is, the first alternative of the condition has been fulfilled—the bond is void and the money deposited must be repaid. Primâ facie the bond is for the protection of the persons who are claiming the land, and accordingly the bond was given to Mrs. Bailey. But, as Lord Justice Romer has pointed out, it may be that, when the claim has been investigated and the compensation ascertained, the company may find that the claimant is not the right person to receive the compensation, and then they may, as provided by the Act and in the bond, pay the compensation money into court, and the question of the persons entitled would be determined by the Court, as often happens when money is paid into court under the Lands Clauses Act. But if the company are content to pay the claimant, they are then entitled to have the condition of the bond observed. The bond then becomes void. Of course the company cannot acquire a good title to the land until they have compensated those to whom it really belongs. That is an entirely different matter. But, in my opinion, in the case of such a bond as this, when the company pay the person who claims to be entitled to the land and that person concurs in the application to the Court, and there is no doubt that the bond was given to such person for his protection, the Court has no duty to inquire whether the obligee of the bond, or the person to

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whom the company have thought fit to pay the purchase-money, is really entitled to receive it. I think, therefore, that this appeal must be allowed, and the money paid out to the company.

VAUGHAN WILLIAMS L.J. I agree. The form of this bond entirely accords with s. 85 of the Act. There are two alternatives in the condition upon the happening of either of which the bond will be avoided; and in this case one of those alternatives has been performed, and therefore the bond is void. No doubt the railway company would have been entitled, had they chosen to do so, instead of treating the bond as simply given for the benefit of the obligee, to deposit the purchase-money when ascertained in the bank for the benefit of the persons interested in the land. But the company have not chosen to do so. They were content to take the risk and to avoid the bond by the performance of the other alternative.

ROMER L.J. I agree.

Solicitors: *Beale & Co.*

W. L. C.

In re BEACHEY.
HEATON *v.* BEACHEY.

[1901 B. 2739.]

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KEKEWICH J.
Nov. 11, 19.
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Dec. 1, 3.

Conveyancing—Leaseholds—Mortgage by Sub-demise prior to Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41)—*Statutory Transfer subsequent to Act—Habendum—"Benefit of said Mortgage"—Legal Estate—Technical Words—Intention—Conveyancing and Law of Property Act*, 1881, *ss.* 27, 63; *Sched. III., Part II., Form* (*A*).

Before the commencement of the Conveyancing and Law of Property Act, 1881, a lessee executed a mortgage of his leaseholds by sub-demise. Subsequently to the commencement of the Act the executors of the mortgagee executed to one of themselves a transfer of the mortgage by supplemental deed in the statutory form (A) in Part II. of Sched. III. to the Act, by which, after reciting the will of the mortgagee, his death, and probate of his will, it purported to "convey and transfer all the benefit of the said mortgage" to the transferee:—

Held, affirming the decision of Kekewich J., that the transfer did not operate, either in terms or by intention, to pass the legal estate in the mortgaged leaseholds.

By an indenture of lease of August 25, 1880, a piece of ground in Woolborough, in the county of Devon, was demised by the Earl of Devon to George King, for a term of ninety-nine years from March 25, 1880, at a peppercorn rent for the first year, and at the yearly rent of 2*l.* 10*s.* for every subsequent year; the lessee covenanting to finish on the said piece of ground within twelve months from March 25, 1880, the two dwelling-houses then already commenced.

By an indenture of September 25, 1880, the said George King demised the premises to John Beachey for the residue of the term, except the last ten days thereof, by way of mortgage for securing the repayment to the said John Beachey of the sum of 350*l.* with interest thereon at 5 per cent. per annum.

By an indenture dated February 9, 1881, the said George King charged the premises in favour of the said John Beachey with a further sum of 50*l.* and interest.

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Vict. c. 41), commenced from and immediately after December 31, 1881 (s. 1).

John Beachey died on June 2, 1884, having by his will, dated September 25, 1883, devised and bequeathed his real and personal estate to Richard William Beachey and John Salter upon certain trusts, and he appointed them his executors.

By an indenture dated November 29, 1893, and made between the said Richard William Beachey and John Salter of the one part, and the said Richard William Beachey of the other part, expressed to be supplemental to the said mortgage and further charge, thereinafter respectively referred to as "the principal indentures," after reciting the will of John Beachey appointing executors, his death, and the probate of his will: It was witnessed that in consideration of the principal sums secured by the principal indentures and all interest then due and thenceforth to become due for the same "having become the property of the said R. W. Beachey," as they the said R. W. Beachey and J. Salter thereby declared, the said R. W. Beachey and J. Salter, "as personal representatives of the said J. Beachey, deceased, and as mortgagees, hereby respectively convey and transfer to the said R. W. Beachey the benefit of the said mortgage and further charge of the 25th day of September, 1880, and the 9th day of February, 1881"—without any further words of limitation and following the form (A) of statutory transfer given in Part II. of the 3rd schedule to the Conveyancing and Law of Property Act, 1881.

By an indenture of December 30, 1893, George Furneaux was expressed to be appointed by the said R. W. Beachey (the said John Salter, though still living, not being a party), and by beneficiaries under the will of John Beachey, a trustee of that will in the place of the said John Salter, who was said to have been discharged; and by an indenture of the same date, expressed to be supplemental to the foregoing indentures, and made in the above-mentioned statutory form, the said R. W. Beachey, as mortgagee, conveyed and transferred to himself and the said G. Furneaux "the benefit of the said mortgage and of the principal indentures."

By another transfer, in the same statutory form, dated January 16, 1894, R. W. Beachey and G. Furneaux, as mortgagees, conveyed and transferred to G. Furneaux alone "the benefit of the said mortgage and of the principal indentures."

By a memorandum dated December 28, 1894, G. Furneaux deposited with the Wilts and Dorset Banking Company, Limited, certain deeds, including the above-mentioned mortgage securities and transfers, to secure his banking account, with the usual undertaking to execute, when required, a transfer of the mortgage securities.

In 1900 Furneaux's overdraft at the bank was considerable, and accordingly he was required by the bank to execute a legal transfer pursuant to his undertaking. This was carried out by an indenture dated August 7, 1900, and made between G. Furneaux of the one part and the bank of the other part, whereby it was witnessed that G. Furneaux (thereinafter called "the mortgagor") covenanted to pay to the bank all moneys then or thereafter to become due from him to them on account current or otherwise, with interest. And it was also witnessed that the said G. Furneaux, as beneficial owner, thereby conveyed and demised to the bank (amongst other hereditaments and property) the hereditaments and property comprised in the above-mentioned mortgage securities, to hold, as to such of them as were freehold, unto the company in fee simple, and as to such of them as the mortgagor was entitled to for any term or terms of years, whether absolute or determinable, unto the company for all the residue of the said terms of years respectively, except the last day thereof respectively (subject to the subsisting equity of redemption), by way of mortgage for securing the repayment to the bank of such moneys and interest as aforesaid.

Various other transfers of portions of the estate subject to the trusts of the will of John Beachey were executed by R. W. Beachey to his co-trustee, George Furneaux, alone, the result of which was—so it was alleged—that George Furneaux converted the properties to his own use.

John Salter, who was named in the will of John Beachey as one of the trustees and executors, died on May 30, 1900.

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In 1901 this action was brought by beneficiaries under the will of John Beachey against R. W. Beachey, G. Furneaux, one Holmes, who was John Salter's legal personal representative, the Wilts and Dorset Banking Company, Limited, and others, claiming (amongst other things) administration of the estate of John Beachey, appointment of new trustees of his will, a declaration that the above-mentioned mortgage belonged to that estate and an order that all deeds relating thereto should be delivered up to the new trustees: also relief against the defendants R. W. Beachey and Holmes on the ground of breaches of trust alleged to have been committed by R. W. Beachey and J. Salter, especially in the transactions whereby the above-mentioned mortgage securities and other trust property purported to have been transferred to G. Furneaux alone: a declaration that the defendant G. Furneaux had fraudulently converted to his own use the said mortgage security and other trust property, and an order on him to make good the loss.

The main question now calling for a report was whether the defendants, the Wilts and Dorset Banking Company, had under the above-mentioned transfers, made in statutory form—although the mortgage securities purported to be transferred were executed before the commencement of the Conveyancing and Law of Property Act, 1881—obtained the legal estate in the mortgaged property, and could so claim a good title thereto as against the parties interested under the will of John Beachey. The bank, in their statement of defence, alleged that they had had no notice of any of the transactions alleged by the plaintiffs to have constituted breaches of trust, or that the defendant, G. Furneaux, was not legally and equitably entitled to the benefit of the mortgage and the moneys thereby secured, or that any one other than that defendant had or claimed any interest in the mortgage or the moneys thereby secured; and that they made all their advances to him and took the conveyance of August 7, 1900, in good faith and without notice of any defect in his title. And they submitted that, the premises comprised in the mortgage being leasehold, they had the legal estate therein, and were entitled to hold the same and the benefit of the mortgage as purchasers for value without notice.

The action was tried before Kekewich J. on November 11 and 19, 1902.

Warrington, K.C., and *Ward Coldridge*, for the plaintiffs.
A. à B. Terrell, for the Wilts and Dorset Banking Company.

KEKEWICH J. In my opinion the Conveyancing Act has nothing to do with this case. The mere fact that the draftsman has, for the purposes of these transfers, adopted a form that is to be found in the Act, seems to me to be immaterial. The Act gives a form as applied to a statutory mortgage, and the form of transfer is expressed to be a form of transfer of a statutory mortgage. When you do not find those elements, the Act has nothing whatever to do with the case.

Looking, then, at the case independently of the Act, I find here a deed which does not pass the legal estate. I think it is idle to contend that the words, "the benefit of the mortgage," are sufficient to pass the estate.

[His Lordship accordingly pronounced judgment containing a declaration that the legal estate in the premises comprised in the indenture of mortgage of September 25, 1880, remained vested in the defendant R. W. Beachey notwithstanding the several indentures whereby the benefit of the said mortgage was purported to be transferred, and that the mortgage belonged to the estate of John Beachey, deceased; and an order that a memorandum of the judgment should be indorsed upon the memorandum of deposit of December 28, 1894, and upon the transfer to the bank of August 7, 1900.]

The bank appealed. The appeal was heard on December 1 and 3, 1903.

Edward Ford and *A. à Beckett Terrell*, for the bank. It is submitted that the transfer of November 29, 1893, operated to pass the legal estate in the property to the transferee. The words used, "the benefit of the said mortgage," are those prescribed by the form (A) of statutory transfer given in Part II. of the 3rd schedule to the Conveyancing Act, 1881.

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It is true that by s. 27 this form of transfer applies only to a transfer of a statutory mortgage, and in the present case the mortgage was not in the statutory form.

But, under the common law, no words of limitation were ever required in order to pass the legal estate in leasehold property. The words here are wide enough to pass everything, unless there is a manifest intention that the legal estate should not pass. Here an intention is shewn that everything comprised in the mortgage should pass. Sect. 63 of the Act—providing that "every conveyance" made after the commencement of the Act shall be effectual to pass all the estate and interest of the conveying parties, unless a contrary intention is expressed—also applies to this case. There is no reason why the transferee should not be regarded as holding as underlessee. In all documents relating to leases the question of what passes is one of intention. In Preston's Conveyancing, 3rd ed. vol. ii. p. 177, it is said "the result of all the cases appears to be that the instrument will operate either as an actual lease, or as an agreement for a lease, according to the intention of the parties, as that intention can be collected from the entire instrument." "All deeds shall be construed favourably, and as near the apparent intention of the parties as possible, consistent with the rule of the law": Cruise's Digest, 4th ed. vol. iv., tit. "Deed," cap. 20, s. 2, p. 242. "Where the intention is clear, too minute a stress ought not to be laid on the strict and precise meaning of words": Ib. p. 243. Here there is no technical rule of law which conflicts with the intention. The legal estate would be a "benefit" to the transferee.

[They referred to *In re Ethel and Mitchells and Butlers' Contract.* (1)]

Warrington, K.C., and *Ward Coldridge*, for the plaintiffs. It is contended that the "benefit of the mortgage" means the benefit of the contractual relation between the mortgagor and the mortgagee. This would include an assignment of the mortgage debt and the benefit of the mortgagor's covenants, but not the property comprised in the mortgage. It is admitted

(1) [1901] 1 Ch. 945.

that these words would not pass the legal estate in freeholds. The omission of words of limitation only affects the quantity of the estate which passes by the deed. Whatever is included in the contract between the mortgagor and the mortgagee will pass by an assignment of the "benefit" of the mortgage.

An informal assignment of this kind will pass the "benefit" of the mortgage, but not the legal estate in the property.

[ROMER L.J. referred to Robbins on Mortgages, vol. ii., p. 826, and *Ex parte Smith.* (1)]

The argument for the appellant comes to this: that for years before the Conveyancing Act conveyancers had been using unnecessarily long forms. The Act was intended to shorten the forms previously in use, and now it is said that as regards leaseholds this might have been done without an Act. In the case of leasehold property the habendum has always been considered to be a material part of a lease as defining the estate to be taken.

[ROMER L.J. referred to *White* v. *Hunt.* (2)]

The assignment must be according to the forms of law in order to operate effectually as a conveyance both of the estate and of the mortgage debt: *Jones* v. *Gibbons.* (3) If a man desires to pass the legal estate in a term of years he must grant all his "estate," or "right," or "title," or "interest": Shep. Touchst. by Preston (7th ed.), p. 98.

[VAUGHAN WILLIAMS L.J. In order to pass the legal estate in leasehold property you must find upon the face of the document an intention on the part of the assignor to deliver up possession so that the assignee may come in before the determination of the term. The question is whether the words are sufficient to explain the intent of the parties that the one shall divest himself of the possession, and that the other shall come into it for a determinate time: Bac. Abr. Leases (K).]

That no doubt is so: the document must shew the intention of the one to quit himself of the benefit and the burden, and of the other to assume them. There is no such intention

(1) (1832) 2 D. & Ch. 271.
(2) (1870) L. R. 6 Ex. 32.
(3) (1804) 9 Ves. 407, 410; 7 R. R. 247.

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shewn here. *Ex parte Smith* (1) does not really apply to the present case, for there the question was whether the intention was to be gathered from the particular language of the recitals in the deed. Again, the form of this transfer is such as to put any one reading it upon inquiry, for it shews that the transferee is himself one of the representatives of the mortgagee: and obviously it was a breach of trust for the representatives to transfer to one of themselves.

Edward Ford, in reply, referred to 5 Bythewood and Jarman's Conveyancing, 4th ed. p. 207, as shewing that in a conveyance of a chattel interest a limitation to "executors, administrators, and assigns" is not necessary in order to pass the legal estate. Whether there had been breaches of trust or not was immaterial so far as the bank was concerned, for the bank claimed to be a purchaser for value without notice.

LORD ALVERSTONE C.J. The only question before us on this appeal is whether the words in the operative part of the transfer of November 29, 1893, are sufficient to pass the legal estate in a mortgage of a leasehold term granted by George King to the testator John Beachey.

Now, it has been very properly admitted by the learned counsel for the appellants that they cannot rely upon the statute as giving any special meaning to the words "the benefit of the said mortgage." The mortgage was not a statutory mortgage, and it is only necessary to look at the language of s. 27 of the Conveyancing and Law of Property Act, 1881, to see that the special meaning can, by virtue of that section, only be given to the words which we have here where the original mortgage was itself a statutory mortgage.

But it is said that the transfer was obviously intended to bear the meaning given by the statute to a transfer of a statutory mortgage. Therefore, what we have to consider is whether, apart from the statute, a conveyance made in this year 1903 of "the benefit" of a mortgage of leasehold property was sufficient to pass the legal estate in the term. Now, I agree

(1) 2 D. & Ch. 271.

that in a conveyance of leaseholds, however inartistic, untechnical, or uncertain the words used may be, if you see an apparent intention that the legal estate shall pass, then it may be held to pass. Looking, then, at the deed before us, and endeavouring to ascertain the intention, I should not myself come to the conclusion that it was the obvious intention of the parties, or, indeed, their intention at all, that the legal estate should pass. I adopt the principle stated by my brother Vaughan Williams in the course of the argument, that on granting or assigning a term of years, there must, in order that the legal estate may pass, be some words which imply the intention to part with the possession. Now, can we ascertain such an intention from this deed? It first of all refers to the mortgage, then it recites the will of the mortgagee appointing executors, his death, the probate of his will. Then the operative part states that, in consideration of the principal moneys and interest "having become the property" of the transferee, the representatives of the mortgagee convey and transfer to R. W. Beachey "the benefit of the said mortgage." It is argued that those words were intended to pass the legal estate in the mortgaged leaseholds; but, in my opinion, it is quite open to argument whether the words were not designedly used to give the transferee the pecuniary benefit of the mortgage only, without putting him in the position of an underlessee.

I agree that possibly, as counsel for the appellant said, making the transferee an underlessee would not have done him much harm, since there was no privity between himself and the original lessee. Indeed, the argument went so far as to say that, if the mortgage had been by way of assignment of the original term, the result would have been the same. But I cannot come to the conclusion that the legal estate was intended to pass by this deed, and it contains no words which would, in ordinary conveyancing language, be sufficient to pass the legal estate. Not finding either any such intention as I have indicated, or any technical or necessary words capable of passing the legal estate, I am of opinion that we ought not to hold that the words "convey and transfer the benefit of the said mortgage" are sufficient to pass the legal

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estate. In my judgment, therefore, the decision of Kekewich J. was right, and this appeal must be dismissed with costs.

VAUGHAN WILLIAMS L.J. I agree.

ROMER L.J. I also agree.

Solicitors: *Rowcliffes, Rawle & Co., for H. Fulton, Salisbury; Stow, Preston & Lyttelton, for Friend & Tarbet, Exeter.*

G. I. F. C.

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[1902 L. 2784.]

Metropolis—Gas—Testing—Interpretation of Statutes—"Daily"—Construing Statute by long prevailing Practice—Sunday Testing—Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 *Vict. c. clxxxi.*), *s.* 7—*Practice—Parties—Injunction—Corporation—Statutory Body—Public Duties—Attorney-General, Suing by.*

By the South Metropolitan Gas Company's special Acts of 1869 and 1876 provision was made for the public testing of the quality of the gas supplied by them to their customers. The mode of testing and the situation and number of the testing places, which were to be provided by the company and to be under the control of the Metropolitan Board of Works (whose powers subsequently became vested in the plaintiffs, the London County Council), were to be prescribed by gas referees appointed by the Board of Trade, and "daily" testings were to be made by gas examiners appointed by the Metropolitan Board.

Similar provisions were contained in the special Acts of the other metropolitan gas companies. By an Act passed in 1880, which was applicable to all the metropolitan gas companies, the provisions as to "daily" testings were substantially re-enacted by a section which provided that a gas examiner should, at each testing place, "make daily" such number of tests as the gas referees should prescribe. Other sections gave the Metropolitan Board, as "the controlling authority," the control and management of the testing places.

There was also a provision in the Act of 1869, which was to be read with the Act of 1880, defining "day" as twenty-four hours, beginning at 9 o'clock in the forenoon of one day and ending at 9 o'clock in the forenoon of the next. The practice under these Acts until 1902 had been to test on week-days only:—

Held (affirming Joyce J., [1903] 2 Ch. 532), that the word "daily" in the Act of 1880 must be construed literally, as including Sundays,

and that the previous practice under that and the earlier Acts was not sufficient to justify the Court in departing from that literal construction; and, accordingly, that the gas examiners appointed by the London County Council were entitled to test on Sundays the gas supplied by the company.

Yewens v. *Noakes*, (1880) 50 L. J. (Q.B.) 132, considered.

Held, also, that the London County Council, as the body entrusted by Parliament with the control and management of the testing places provided by the company, were proper plaintiffs in an action for an injunction to restrain the company from preventing the gas examiners from making tests on Sundays; and, therefore, that it was not necessary that the action should be brought by the Attorney-General.

THIS was an appeal by the defendants from the decision of Joyce J. (1)

The statement of facts in the former report of the case, and the statutory enactments there set out, should be supplemented as follows:—

By the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), separate districts were assigned to the several metropolitan gas companies, including the defendant company, and every gas company was required to provide in some convenient place apparatus for testing the illuminating power of the gas; and a gas examiner appointed by the local authority was, on giving three hours' notice, to have access at all times to such apparatus, when so directed by the local authority, for the purpose of examining the illuminating power and purity of the gas supplied; and each company was required to afford to the examiner reasonable facilities for the examination, every person obstructing any such examiner in the exercise of his duties under the Act to be liable to a penalty not exceeding 10*l*.

By the defendants' special Act of 1869, intituled the South Metropolitan Gaslight and Coke Company's Act, 1869 (32 & 33 Vict. c. cxxx.), s. 3, the term "day" was defined as meaning "twenty-four hours reckoned from nine o'clock in the forenoon of one day to nine o'clock in the forenoon of the next following day, so much of each day as is before nine o'clock in the forenoon being reckoned as part of the immediately preceding day of the month or week."

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By a general Act, the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), it is enacted (s. 1) that the Gasworks Clauses Act, 1847, and that Act shall be read as one Act; and the Act contains various enactments requiring the undertakers to provide testing places, and for the appointment by the local authority of gas examiners to test (s. 29) the illuminating power and purity of the gas "on any or every day." By s. 34 the undertakers are required to give to the gas examiners and to the local authority and their agents access to the testing places, subject, on default, to a liability to a penalty not exceeding 5*l*.

By the South Metropolitan Gaslight and Coke Company's Act, 1876 (39 & 40 Vict. c. ccxxix.), it is enacted (s. 36) that "The prescribed testing places, materials, and apparatus provided by the company shall be under the control and management of the Metropolitan Board"—meaning, the then Metropolitan Board of Works.

By the Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880, the gas referees are required (ss. 5 and 6) from time to time, after giving notice to the controlling authority, then the Metropolitan Board of Works, but now the London County Council, to visit the testing places and examine the apparatus for the purpose of ascertaining that it was kept in proper working order, and to prescribe the mode and times of testing.

Sect. 7 (which for convenience is again set out) is as follows: "A gas examiner shall at each testing place make daily such number of tests as the gas referees may prescribe for ascertaining whether during the whole of each day the illuminating power and purity of the gas supplied at such testing place by the company are such as are respectively prescribed under the special Act. Provided that the tests for illuminating power shall be taken at intervals of not less than one hour. And in the event of the gas being ascertained to be defective in any such particular such examiner shall forthwith give notice thereof to the company."

Sect. 10 is as follows: "The company may, if they think fit, on each occasion of the testing at any testing place of the illuminating power, purity, and pressure of the gas supplied by

them, be represented by some officer, but such officer shall not interfere in the testing, and the controlling authority shall state at what times it is proposed to make such testings on any particular day upon receiving a request in writing from the company in the forenoon of the previous day."

Sect. 11 enacts that each gas examiner shall "on each day" report the result of the testings on the immediately preceding day to the controlling authority, to the gas referees, to the chief gas examiner, and to the company.

And the Act contains various sections in effect giving to the controlling authority the control and management of the testing places, with power to recover penalties from any company in case the gas supplied is of defective illuminating power.

By the South Metropolitan Gas Act, 1881 (44 & 45 Vict. c. clxxii.), the defendants were authorized to purchase additional lands, to construct new works, and to raise further capital; and the new works were thereby placed under the control of the Metropolitan Board of Works.

The appeal was heard on December 7 and 8, 1903.

The main question on the appeal was that argued in the Court below, namely, whether, having regard to the practice that had existed ever since the passing of the defendants' special Act of 1869, of holding gas testings on week-days only, the word "daily" in s. 7 of the Act of 1880 should be construed as including Sundays.

Two further points, not taken in the Court below, were raised by the defendants on the appeal, namely, (1.) that a new obligation not known to the common law had been created by statute and a special remedy for the breach of that obligation given by way of penalty by the Act of 1860, and particularly by s. 34 of the Act of 1871, and that consequently the Court had no jurisdiction to entertain the present action; and (2.) that, assuming there was a right of action against the defendants, the London County Council were not the proper plaintiffs, but that, as the real object of the action was to enforce the performance of a public duty, the proper plaintiff was the Attorney-General.

The first point, however, was eventually abandoned by the

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defendants' counsel upon their attention being called by the plaintiffs' counsel to a section in the Metropolis Gas Act, 1860, s. 55, which provides that "no special remedy or provision for giving relief to any person given by this Act shall prejudice or diminish the general jurisdiction of any of Her Majesty's Superior Courts of Law or Equity over or with respect to the acts or defaults in respect of which the special remedies or provisions are so given." The second point only of these two subsidiary points, therefore, requires notice in the present report.

Warmington, K.C., Lord Robert Cecil, K.C., and *L. Rostron*, for the defendants, urged, as to the construction to be placed upon the word "daily," the same arguments, supported by the same authorities, as in the Court below.

Upon the point that, assuming there was a right of action against the defendants, the London County Council were not the proper plaintiffs, they submitted that the plaintiffs did not allege that they or their servants had been obstructed in the control and management of the testing stations. The gas examiners were not the servants of the London County Council, but of the gas referees. The plaintiffs were really claiming to enforce by means of an injunction the performance of a public duty. For that purpose the proper plaintiff was the Attorney-General, and not the London County Council.

Hughes, K.C., and *T. T. Methold*, for the London County Council, upon the main point, also urged the same arguments, and cited the same authorities, as in the Court below.

Upon the objection that the London County Council were not the proper plaintiffs, they submitted that s. 27 of the Act of 1869, s. 36 of the Act of 1876, and ss. 5, 6, and 10 of the Act of 1880, gave the control and management of the testing stations to the London County Council; that the defendants had interfered with that control and management, and the action was really brought to restrain that interference; and that, as the plaintiffs had by statute that control and management vested in them, they were the proper plaintiffs in such an action.

Warmington, K.C., in reply.

VAUGHAN WILLIAMS L.J. We in this Court have nothing to do with the question whether the practice of having no gas tests on Sunday was a convenient practice, or a practice which was advantageous to the public. That is not for us to consider. The practice of having no tests on Sunday has existed for a long time, but that is not a reason why we should violate the plain construction of the Act of 1880, unless the practice since the Act of 1869 has been of such a nature that we ought to impute to the Legislature the knowledge of it when it passed the subsequent Acts. In my judgment the present case is not such a case. We merely have to construe the words of s. 7 of the Act of 1880, which is as follows: [His Lordship read the section, and continued:—]

Now I cannot doubt that, according to their natural meaning and their primâ facie meaning, the words "make daily such number of tests" mean every day inclusive of Sunday. I do not say that an Act of Parliament in which those words were used might not admit of being differently construed, either by reason of the subject-matter of the Act, or by reason of the contents of the Act taken as a whole: that is not the case here. Both under the general Act of 1847, and the Act of 1881, and also under the special Acts of this company, and of each of the other companies, the obligation to supply gas of the proper illuminating power and of the proper quality is a continuing obligation which has to be performed on every day; and, in the nature of things, there is just as much necessity for having the illuminating power and quality of the gas tested upon a Sunday as upon any other day of the week.

Under these circumstances, having regard to the continuing nature of the obligation on every day, including Sunday, I cannot doubt myself that the words "to make daily such number of tests" apply to Sunday as well as to any other day of the week.

That being so, the only question is whether one ought to construe these words differently by reason of the practice which has, as a fact, been maintained during a great many years, at all events since 1869.

Cases have been cited to shew that sometimes you are not

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only entitled but bound, where you have Acts of Parliament passed in reference to a matter on which there has been a continuity of Acts of Parliament in succession running on the same lines, to take into consideration the previous practice. The strongest case probably of all those which were cited is that of *Yewens* v. *Noakes* (1), in which Thesiger L.J.—speaking of a case in which there was living in a building, occupying it, not only the caretaker himself, but also his wife and children, and the question being whether the occupation came within the exemption of the statute—says this: "Whilst it is true that we ought not to construe an Act itself by looking at the practice which has taken place in carrying the Act out, it is equally true that we are entitled to construe a subsequent Act, not only with regard to the actual words used, but also to the practice which had grown up and existed at the time the subsequent Act was passed."

That, undoubtedly, is a strong authority for saying that such a practice may, in the case that Thesiger L.J. described, be taken into consideration in construing the later Act of Parliament; and I do not propose to depart from or whittle down that proposition in any degree. But what does the Lord Justice mean? Does he mean that you are to have regard to every practice by persons who have a statutory duty thrown upon them, and who for a long period have neglected to perform that which, according to the natural construction of the words of their Act of Parliament, would be their duty? I think not. I do not think he means to say that one is always to impute to the Legislature a knowledge of that neglect of duty by those who have had a statutory obligation thrown upon them.

If, then, it is not always that this imputation is to be made, when is it to be made? I think it is to be made in those cases in which it is reasonable to impute such a knowledge to the Legislature. A case in which it very usually has been done is this: very often in an antecedent or earlier Act in similar frame upon the same subject-matter, the very question of the interpretation of a particular section, or of particular words, in the

(1) 50 L. J. (Q.B.) 132, 135.

Act has come into Court for decision, and the Court has put a construction upon the words in that earlier Act; and then, in the later Act, the Legislature uses identical words. It could not, in such a case at all events, be supposed, however doubtful the construction of those words might be, that the Legislature passed the subsequent Act without knowledge of the previous decision upon the same words in the earlier and similar Act. Then take again the case which was actually before the Court—*Yewens* v. *Noakes*. (1) That was a case in which the knowledge which was sought to be imputed to the Legislature was the practice of a public department in respect of inhabited house duty. One can quite understand that the practice of public departments might be supposed to be within the knowledge of the Legislature, but I do not think we ought to carry that so far as to say that in the present case the Legislature must have had within their knowledge and view the practice of the gas examiners as to holding no tests upon Sundays.

In these circumstances it seems to me we have no choice but to affirm Joyce J.'s decision, and to hold that these words "make daily" include every day of the week, Sunday inclusive.

Other points have been made which it is not necessary to go into now, because in my opinion they have been fully disposed of by the plaintiffs' counsel.

I think we are bound to hold that the testings ought to be made, under the terms of the statute, on Sundays as well as on week-days, and therefore this appeal must be dismissed with costs.

ROMER L.J. I also am of opinion that this appeal fails. Upon what I may call the main question, it appears to me to be clear that the decision of Joyce J. is correct. Whether you look at the defendant company's special Act of 1869, or at the Act of 1876, or at the Act of 1880, it appears to me to be clear, on the construction of those Acts, that the word "daily" means what it says, and does not exclude any day in particular, like Sunday.

On the Acts themselves, if there were nothing but the Acts

(1) 50 L. J. (Q.B.) 132.

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to construe, I do not really think that any substantial argument on behalf of the appellants could be or has been addressed to us. The gas has to be supplied on a Sunday as well as on any other day, and there is just as much reason why the gas should be good on a Sunday, and of proper purity and so forth on that day, as well as on any other day. Why should it not be tested on that day as well as on any other day? Nor can I see why, under these Acts, any distinction should be attempted to be drawn between a day in the week, say from Tuesday morning at 9 o'clock to the following Wednesday at 9 o'clock, or from Sunday at 9 to Monday at 9: I take the hour of 9 because, under the Acts, the term "day" is defined as meaning twenty-four hours from 9 o'clock in the forenoon of one day to 9 o'clock in the forenoon of the following day.

The only question is—and that forms really the basis of the argument of the appellants on this head—Can the plain meaning of the Acts of Parliament be departed from, as to the later Acts, because a practice has grown up of not taking the tests on Sunday, or because, as I understand, a police magistrate may, in a case that came before him, have arrived at a decision implying that a testing on Sunday was not in his opinion obligatory under the Act? I think clearly not. There is nothing from the fact of that practice and that decision which would justify us in saying that, when the Legislature passed the Acts of 1876 and 1880, it did not intend to enact what it had previously enacted in 1869, and to have the word "daily," as used in those subsequent Acts, used exactly in the same sense as it had been used in the Act of 1869.

With regard to the point as to whether the county council are entitled to sue, I clearly think they are. It was suggested that they had no sufficient interest in the subject-matter of this action to justify them in being the plaintiffs in the action. But the county council is the controlling authority under the Acts, and, in particular, it has had committed to it the control and management of the testing stations. Why has it had committed to it the control and management of the testing stations? Clearly to enable it to carry out the duties and obligations cast upon it as the controlling authority.

Now the county council are of opinion that, gas being delivered on a Sunday, it ought to be tested on a Sunday according to the wording of the Act, but they find that the gas examiners, the testing operators, are not allowed by the defendant company to enter the testing stations, although they are under the control and authority of the county council. The county council say that, but for the interference of the defendants, the testing would go on daily, because the testers are quite willing and ready, and in pursuance of their duty, to go to the testing stations daily, but that they, the county council, are prevented, as the controllers of the testing stations, from allowing the testers to go there because the defendant company choose to say that no tests shall be made on the Sunday, and that no one but themselves shall have any access to the testing stations on Sundays. It appears to me that the county council have sufficient interest, obligations, and rights to justify them in coming to this Court and seeking for an injunction to restrain the defendants from practically excluding the county council and their testers from the testing stations; and that, in substance, is what this action is for, the real question behind it being that which we have decided, namely, as to whether, under the Acts of Parliament, the testing ought to go on at all on a Sunday.

It appears to me, therefore, that the appeal wholly fails, and should be dismissed, and with costs.

STIRLING L.J. I am of the same opinion. I agree with what has been said by Joyce J. in the Court below and by my brethren here upon the main question raised by this action, namely, whether the word "daily" includes Sunday, and I do not think I can usefully add to what has been said by them.

With regard to the question as to whether the London County Council are the proper plaintiffs in the present action, if it were necessary to decide it, I should be of opinion that the London County Council were the proper plaintiffs. To them, by the Act of 1876, are entrusted the control and management of the testing places, materials, and apparatus provided by the company, and it seems to me that, so far from

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the company being entitled to control these places, the view taken by the Acts, particularly the Act of 1880, is that everything which is necessary to be done for carrying into effect the directions of the Act with respect to testing shall be dealt with by the controlling authority, namely, the London County Council, and not by the company. That to my mind is shewn very strongly by s. 10 of the Act of 1880, which, whilst it gives the company the power, if they think fit, to be represented by an officer at each testing, provides this —that "The controlling authority shall state at what times it is proposed to make such testings on any particular day upon receiving a request in writing from the company in the forenoon of the previous day." That seems to me to shew that it is for the company to apply to the controlling authority, the London County Council, for the purpose of exercising the power conferred by this portion of the Act, and that they, the company, have not the power of excluding the controlling authority, and the persons authorized by them, from the testing stations which have been established under the Act.

It seems to me that in this case there was a clear interference by the defendants with the control and management which are by statute vested in the London County Council. I think, therefore, that the appeal fails and ought to be dismissed with costs.

It appeared that, the parties being unable to come to any arrangement under Joyce J.'s judgment, the plaintiffs, under the liberty to apply given to them by the judgment, subsequently applied to Kekewich J. by motion for an injunction, and that his Lordship made an order granting the injunction. The defendant company thereupon served notice of appeal from that order also, but the appeal had not yet come into the paper for hearing.

Warmington, K.C., now agreed to treat Kekewich J.'s order as before the Court on appeal, and that appeal also was accordingly dismissed with costs.

Solicitors: *Hicklin, Washington & Pasmore; W. A. Blaxland.*

G. I. F. C.

In re WELSBACH INCANDESCENT GAS LIGHT COMPANY, LIMITED.

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[00213 of 1903.]

Company—Limited Liability—Memorandum of Association—Conditions—Rights of Shareholders inter se—Power of Alteration—Validity—Reduction of Capital—Special Resolution—Confirmation by Court—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 12—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

The memorandum of association of a limited company, besides stating the objects of the company and the amount of its capital, stated that the capital was to be divided into specified numbers of preference, ordinary, and deferred shares which were to have specified rights inter se. The memorandum further provided that the rights for the time attached to the several classes of shares respectively might be modified or dealt with in the manner mentioned in the accompanying articles of association :—

Held, that, inasmuch as s. 8 of the Companies Act, 1862, does not require that the rights of the shareholders inter se shall be stated in the memorandum of a limited company, this power of modification of those rights was valid.

Ashbury v. *Watson*, (1885) 30 Ch. D. 376, distinguished.

The company, having passed a special resolution for the reduction of its capital, also resolved in accordance with the provisions of the articles that, after the special resolution had been confirmed by the Court, the rights of the shareholders inter se should be altered in favour of the ordinary shareholders at the expense of the preference shareholders. Some of the preference shareholders opposed the company's petition for the confirmation of the reduction because of this alteration of their rights :—

Held, that the scheme for reduction, including the alteration of the rights of the shareholders, was fair and equitable, and that the reduction ought to be confirmed.

Decision of Buckley J. affirmed.

APPEAL from an order made by Buckley J. confirming a special resolution for the reduction of the capital of the company.

The company was incorporated under the Companies Acts, 1862 to 1893, with limited liability, on December 9, 1897.

The memorandum of association, after stating the objects of the company, which were (inter alia), "to acquire and take over as going concerns and amalgamate the undertakings" of four then existing companies, "and all or any of the assets and

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liabilities of any of" those companies, provided by clause 5 that "the capital of the company is 3,500,000*l.*, divided into 300,000 preference shares of 5*l.* each, 1,350,000 ordinary shares of 1*l.* each, and 650,000 deferred shares of 1*l.* each." By clause 6, "The rights following shall be attached to the aforesaid shares inter se, subject as hereinafter provided, namely—(A) The said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the capital for the time being paid up thereon respectively, and shall rank both as regards such dividend and as to capital in priority to all other shares in the original capital, but shall not confer any further right to participate in profits or assets. (B) Subject as aforesaid, the ordinary shares shall confer on the holders the right to a fixed cumulative dividend at the rate of 7 per cent. per annum on the capital for the time being paid up thereon respectively, and shall rank both as regards such dividend and as to capital next after the said preference shares. (C) Subject as aforesaid, the said deferred shares shall confer the right to a fixed cumulative dividend at the rate of 7 per cent. per annum on the capital for the time being paid up thereon respectively, and shall rank both as regards such dividend and capital next after the ordinary shares. (D) Subject as aforesaid, any profits which it may at any time be determined to distribute amongst the members, and in a winding-up any surplus assets after repayment of capital, shall be divided as to one-half between the holders of the ordinary shares aforesaid in proportion to the ordinary shares held by them respectively and as to the other half among the holders of the deferred shares aforesaid in proportion to the deferred shares held by them respectively. (F) The rights for the time being attached to the said several classes of shares respectively may be modified or dealt with in the manner mentioned in clause 52 of the accompanying articles of association, but not otherwise, and that clause and also clauses 157 and 159 of the said articles shall be deemed to be incorporated herein and have effect accordingly."

Clauses 157 and 159 applied in the event of a winding-up of the company.

By clause 50 of the articles the company was empowered from time to time by special resolution to reduce its capital in the manner provided by s. 3 of the Companies Act, 1877.

By clause 52, "Whilst the capital is divided into different classes of shares, all or any of the rights and privileges attached to each class may be modified by agreement between the company and any person purporting to contract on behalf of that class, provided that such agreement (1.) is ratified in writing by the holders of at least two-thirds of the issued shares of that class, or (2.) is ratified by an extraordinary resolution passed at a separate general meeting of the holders of the shares of that class, and all the provisions hereinafter contained as to general meetings shall, mutatis mutandis, apply to every such meeting, but so that the quorum thereof shall be members holding or representing by proxy two-thirds of the issued shares of the class." The articles also provided that all the provisions therein contained should, so far as circumstances would admit, apply to stock as well as to shares.

By clause 122, "The profits of the company which in respect of each year or other period it shall be determined to distribute among the members shall be applied according to their rights and interests."

By clause 123, "The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits."

By clause 124, "No larger dividend shall be declared than is recommended by the directors; but the company in general meeting may declare a smaller dividend."

By clause 125, "The declaration of the directors as to the amount of the profits of the company shall be conclusive."

All the preference and all the ordinary shares were issued and paid up in full. Of the deferred shares only 629,539 were issued, and they were paid up in full. The preference shares were afterwards converted into preference stock, and the ordinary shares into ordinary stock. Both were afterwards reconverted into 1*l.* shares.

In December, 1901, an advisory committee appointed by the shareholders reported that in their opinion the company

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had been largely over-capitalized, and recommended that the capital should be largely reduced and readjusted.

On May 7, 1903, three agreements were entered into between the company and three persons respectively purporting to act on behalf of the three classes of stockholders respectively. Each of these agreements contained recitals to the effect that the company's paid-up capital was to a large extent unrepresented by available assets, and that a scheme for the reduction of capital and modification of class rights had been prepared and embodied in a series of resolutions which it was proposed to pass as special resolutions in the terms indicated in an annexed form of notice, and that the proposed special resolutions involved the modification of the rights and privileges attached to the preference and ordinary stock and deferred shares respectively; and it was agreed (1.) that so soon as the agreement should be ratified as below mentioned the company should be at liberty to pass special resolutions in the terms indicated in the annexed form of notice, and to apply to the Court for an order confirming the reduction of capital as by such special resolutions was provided for; (2.) the rights and privileges attached to (*a*) the preference stock, (*b*) the ordinary stock, and (*c*) the deferred shares should be modified so far as to allow the said special resolutions to be passed and have effect; (3.) the company was to convene the requisite meetings for passing the said special resolutions, and to use its best endeavours to procure the passing thereof. Each agreement was conditional on its being ratified in one of the modes prescribed by clause 52 of the articles. The annexed notices of meetings which were to be held set forth the resolutions which it was proposed to pass.

These agreements were, on May 20, 1903, respectively ratified at meetings of the preference stockholders, the ordinary stockholders, and the deferred shareholders respectively, in accordance with clause 52 of the articles. On the same day an extraordinary general meeting of the company was held at which the following special resolutions were (inter alia) duly passed, and they were afterwards duly confirmed on June 11, 1903: "(4.) That the 1,500,000*l.* preference stock of the com-

pany be and the same is hereby reconverted and divided into 1,500,000 preference shares of 1*l.* each, and that the 1,350,000*l.* ordinary stock of the company be and the same is hereby reconverted and divided into 1,350,000 ordinary shares of 1*l.* each. (5.) That the capital of the company be reduced to 1,345,000*l.*, divided into 1,500,000 preference shares of 13*s.* and 1,350,000 ordinary shares of 5*s.* each, and 650,000 deferred shares of 1*s.* each, and that such reduction be effected as follows: (1.) By cancelling paid-up capital which is unrepresented by available assets to the extent of 7*s.* in respect of each of the preference shares, and by reducing the nominal amount of such preference shares accordingly to 13*s.* each; (2.) by cancelling paid-up capital which is unrepresented by available assets to the extent of 15*s.* in respect of each of the ordinary shares in the company, and by reducing the nominal amount of such ordinary shares to 5*s.* per share; (3.) by cancelling paid-up capital which is unrepresented by available assets to the extent of 19*s.* in respect of each of the outstanding deferred shares in the company, and by reducing the nominal amount of such deferred shares and of the unissued deferred shares to 1*s.* per share." Another special resolution was also passed that the articles of association of the company be altered by adding at the end thereof the following additional provisions, namely, clause 163, to the effect that immediately after the confirmation by the Court and the registration of the order and a minute approved by the Court in accordance with s. 15 of the Companies Act, 1867, the directors should by resolution consolidate the preference shares into preference stock and the ordinary shares into ordinary stock, and should thereupon by resolution divide each holding of preference stock into two sections, namely, one of 6 per cent. cumulative preference stock, and the other of ordinary stock, such sections bearing the same ratio to each other as 40 to 25, and the directors should by resolution reconvert the said stock of each class into shares of 1*l.* each, and should thereupon by resolution convert the deferred shares, if any, into ordinary stock, and upon such conversion should reconvert such ordinary stock into ordinary shares of 1*l.* each,

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to the intent that the capital might consist in part of 600,000 6 per cent. cumulative preference shares of 1*l.* each, and in part of ordinary shares of 1*l.* each, conferring the rights next specified, namely, "As from the time when the said order and minute shall have been registered as aforesaid the profits of the company from time to time available for dividend shall be applicable as follows: (1.) to the payment of the cumulative dividend on the preference shares or stock as from the registration aforesaid; (2.) to the payment of a dividend on the ordinary shares or stock. As from the time when the said order and minute shall have been registered as aforesaid the surplus assets available for distribution amongst the members in a winding-up shall be applicable, first, to the payment off of the preference shares or stock at the rate of 150*l.* for every 100*l.* of such stock, and, secondly, the surplus shall be divided amongst the holders of the ordinary shares or stock rateably in proportion to the amount of such shares or stock held by them respectively. The provisions hereby made in regard to the rights of the members of each class as regards dividends and distribution of assets in a winding-up shall take effect by way of modification of the rights originally attached thereto, and accordingly such members shall not be entitled to any rights inconsistent therewith, and in particular all arrears of undeclared dividends up to the time when the said order and minute shall be registered shall be extinguished."

Before the meetings were held the directors sent to the shareholders a circular in which they said that, if the proposed scheme were not adopted, the payment of dividends would have to be indefinitely postponed.

These resolutions having been passed, the company presented a petition for the confirmation by the Court of the resolutions for the reduction of the capital. The petition alleged that previously to the passing of the resolutions paid-up capital to an amount exceeding 2,134,039*l.* had been lost or was unrepresented by available assets; and particulars of the alleged loss were stated.

The petition also stated that "no dividends have been paid on the preference stock and shares in the capital of the com-

pany since March, 1900. On the ordinary shares a dividend of 7 per cent. was paid until March 31, 1899, and an interim dividend of 2½ per cent. on account of the year ending March 31, 1900. Nothing has since been paid. The deferred shares received a dividend at the rate of 7 per cent. for a period of about three months to March 31, 1898, and nothing has since been paid."

It was also alleged that the proposed reduction of capital "does not involve either the diminution of any liability in respect of any unpaid capital or the payment to any shareholder of any paid-up capital."

Evidence was adduced to prove the alleged loss of capital.

The petition was opposed by the United States Debenture Corporation, who were holders of preference stock.

Buckley J. held that the alleged loss had been proved; that the proposed reduction was in accordance with the legal rights of the shareholders, having regard to clause 52 of the articles; and that the proposed reduction was fair and equitable. He accordingly made an order confirming the resolutions.

The corporation appealed.

Younger, K.C., and *Kirby*, for the appellants. It is contended that the scheme is unfair and inequitable; it amounts to a confiscation in part of the interest of the appellants. It compels them to accept ordinary shares for part of their preference shares, and it deprives them of dividends in arrear. It is submitted also that the alleged loss of capital is not proved by the evidence. Moreover, it is submitted that Buckley J. was wrong in holding that the scheme was in accordance with the strict legal rights of the shareholders. The learned judge so held because of the power contained in the memorandum to alter the rights of the preference and ordinary shareholders inter se. It is submitted that such a power is ultra vires and invalid. Though the alteration made by the new clause 163 added to the articles is not part of the resolution for reduction of capital which required confirmation by the Court, it is part of the scheme for reduction, and must be taken into consideration by the Court in deciding whether

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the resolution for reduction shall be confirmed. By s. 12 of the Companies Act, 1862, the conditions contained in the memorandum of association of a limited company cannot be altered except in certain specified ways. It is true that s. 8 does not require that the rights of the shareholders inter se shall be stated in the memorandum, yet, if the memorandum does contain a statement of those rights, they become one of the conditions which cannot be altered: *Ashbury* v. *Watson* (1); Palmer's Company Precedents, 8th ed. Pt. I. pp. 481, 482; *Collins* v. *Birmingham Breweries.* (2)

[VAUGHAN WILLIAMS L.J. referred to *Allen* v. *Gold Reefs of West Africa.* (3)]

Though this alteration of the rights of the shareholders is ultra vires, it may not deprive the Court of jurisdiction to confirm the reduction; but the Court will not do so unless it is proved to be fair and equitable: *British and American Trustee and Finance Corporation* v. *Couper.* (4) There Lord Herschell L.C. said: "There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinised by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But that is quite a different thing from saying that the Court has no power to sanction it." The principle there stated must apply a fortiori when there are different classes of shareholders. In *In re Barrow Hæmatite Steel Co.* (5) Cozens-Hardy J. held that the Court ought not to confirm a reduction of capital which would benefit the ordinary shareholders at the expense of the preference shareholders.

[ROMER L.J. referred to *Underwood* v. *London Music Hall, Ld.* (6); *Andrews* v. *Gas Meter Co.* (7); *In re Samuel Allsopp & Sons, Ld.* (8)]

Even if a reduction of capital is in accordance with the legal

(1) 30 Ch. D. 376.
(2) (1899) 15 Times L. R. 180.
(3) [1900] 1 Ch. 656.
(4) [1894] A. C. 399, 406.
(5) [1900] 2 Ch. 846, 855.
(6) [1901] 2 Ch. 309.
(7) [1897] 1 Ch. 361.
(8) (1903) 19 Times L. R. 637.

rights of the shareholders the Court will not confirm it if it is not fair and equitable, though no doubt the Court has power to confirm a reduction which alters the legal rights of the shareholders if the Court considers the scheme fair and equitable. In *Andrews* v. *Gas Meter Co.* (1) the right of a company to issue preference shares was established on the ground that there was no implied condition in the memorandum that all the shareholders should be on an equal footing. *Underwood* v. *London Music Hall, Ld.* (2), is really an authority in favour of the appellants.

Eve, K.C., and *Martelli*, for the company.

[VAUGHAN WILLIAMS L.J. We wish to hear you on this point: How could it be desirable in the interest of any one to make this great alteration in the rights of the shareholders inter se?]

The object was to have a scheme which would adjust the rights of all the shareholders in view of the fact that the company had been carrying on its business at a loss. The preference shareholders by a large majority determined that this was the right thing to do. It may be that many of them held also ordinary shares. The company was a wreck, and the whole of its assets after payment of its debts really belonged to the preference shareholders.

[ROMER L.J. Does not the power of modification given by clause 52 of the articles apply only to the future? Can it affect the right already accrued to a preferential dividend?]

That right of a preference shareholder is only a right to demand payment of the dividend out of future moneys available for the payment of dividend. The preference shareholders may well have thought that, with a view to the possible future prosperity of the company, it would be to their advantage to have part of their holdings in ordinary shares.

VAUGHAN WILLIAMS L.J. We do not think there is anything so unfair in the scheme as to make the decision of Buckley J. wrong. But we wish to hear Mr. Younger as to the proof of the alleged loss of capital.

(1) [1897] 1 Ch. 361. (2) [1901] 2 Ch. 309.

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Younger, K.C., and *Kirby* read and commented on the evidence.

Eve, K.C., and *Martelli*, for the company, were not called upon as to this point.

VAUGHAN WILLIAMS L.J. In my judgment this appeal fails. I do not know that there is really much to be said, so far as I am concerned, except that I entirely agree with the judgment of Buckley J. and the reasons which he gave for it.

There are only two points for consideration. The first is the proof of the alleged loss of capital. If you go through the figures and deal with them as Buckley J. has done, there cannot, in my opinion, be any doubt that the loss has been proved.

Now, assuming the loss to be proved, there is very little else to be said. If you had a memorandum which gave to a class of shareholders certain privileges and rights unconditionally, then I agree to the full that *Ashbury* v. *Watson* (1) is conclusive to shew that the company could not alter or modify the privileges thus unconditionally given by the memorandum. But that is not this case. Here, so far from the privileges being given unconditionally, it is obvious that they are given conditionally, as is shewn by clause 6 (F) of the memorandum of association. [His Lordship read the clause.] The result is that these privileges are not unconditional, but conditional; and it seems to me that all the proper steps have been taken to bring about the modification of the rights and privileges of the preference shareholders.

Under these circumstances I can see no reason why the sanction of the Court to this scheme should be refused upon the ground that it in any way departs from the rights of the preference shareholders. The rights of the preference shareholders, as was pointed out by Buckley J., are now those which have been brought about by the modification; and under these circumstances the scheme is in no way inconsistent with those rights.

That being so, the only matter left to consider is whether

(1) 30 Ch. D. 376.

the scheme is unfair. I entirely agree with Buckley J. that, whether a scheme does or does not accord exactly with the legal rights of the shareholders, the Court may always consider whether it is a fair or an unfair scheme. In my judgment this is a fair scheme. I cannot help saying—although this is in no way conclusive upon the question of fairness—that the Court always does take into consideration the wishes of the shareholders who are affected by the scheme; and in this case the majorities which have been obtained, to my mind, go far to shew, at all events, that the shareholders, and in particular the preference shareholders, regarded this as a fair scheme. And after all, these modifications might have been brought about and have bound the preference shareholders, even though there had been no scheme for the reduction of capital.

I think, under these circumstances, we ought to affirm the judgment of Buckley J., and with costs. It is true that Buckley J. said he thought the opposing shareholders had assisted the Court by the matters which they brought to its notice, and so he gave them their costs. I have not spoken to my learned brothers on this matter, but it does not strike me that in bringing this case on appeal the appellants have assisted the Court.

ROMER L.J. I agree that this appeal must be dismissed.

The only real point in the case is the point argued that the provision in clause 6 (F) of the memorandum was invalid, namely, the provision that the rights for the time being attached to the several classes of shares might be modified or dealt with in the manner mentioned in clause 52 of the articles. In my opinion that is a perfectly good provision. The rights and privileges of the different classes of shares inter se constitute a matter not specially provided for by the Legislature. There is no reason why those rights and privileges should not be altered from time to time, or why the alteration should not be duly provided for. Such a provision is not like one concerning the objects of the company or the total amount of its capital. Those matters, as is provided by s. 8 of the

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Companies Act of 1862, must be fixed by the memorandum of association; they must be specified in the memorandum of association, and cannot afterwards be changed at the will of the company. But there is no legislative provision as to the rights and privileges of the different classes of shareholders inter se, and the company may properly provide for any modification of those rights and privileges by either the articles or the memorandum.

A fallacious argument was adduced on behalf of the appellants, namely, that the rights and privileges of the preference shareholders were fixed by the memorandum of association, clause 6, paragraphs A to D inclusive, and that those paragraphs constituted a condition of the memorandum which could not be altered. The answer to that argument is perfectly clear. The condition as to the rights and privileges of the preference and ordinary shares inter se contained in the memorandum is not that which is expressed by the paragraphs A to D, but that which is expressed by those paragraphs plus paragraph F. I have no doubt that the provision contained in paragraph F is perfectly valid, and, that being so, the whole argument for the appellants in substance goes by the board, and I think the appeal must fail.

STIRLING L.J. I am of the same opinion.

The main argument in this Court has been upon a point which, as I understand, was not made before Buckley J., and certainly is not dealt with in his judgment, namely, that paragraph F of clause 6 of the memorandum of association was beyond the powers of the company. [His Lordship read clauses 5 and 6 of the memorandum and clause 52 of the articles, and continued:—]

Now it was decided by this Court in *Ashbury* v. *Watson* (1) that when the memorandum of association of a company stated that the holders of a portion of its shares were to have a right to receive a preferential dividend, and there was no power to modify that provision contained in the memorandum, it was a condition which could not be altered by the company,

(1) 30 Ch. D. 376.

regard being had to the provisions of s. 12 of the Companies Act, 1862. By that decision I am bound, and I have no desire to depart from it. But how does it apply to the present case? It is said that these paragraphs A, B, and C of clause 6 define the rights of the shareholders and constitute "conditions" within the meaning of the decision in *Ashbury* v. *Watson* (1); and so they do. Then it is said that effect is not to be given to paragraph F in the same clause. There I part company with the argument. Clause 6 provides that the rights mentioned shall be attached to the shares "subject as hereinafter provided," and if paragraphs A, B, and C are conditions within the meaning of the decision in *Ashbury* v. *Watson* (1), equally so is paragraph F a condition within the meaning of that decision and of s. 12 of the Companies Act, 1862. The same document which confers a preference on one class of shares contains also provisions which make the rights and privileges of the preference shareholders capable of alteration, and, unless it can be established that such a stipulation is forbidden by law, effect must be given to it as well as to the conditions contained in paragraphs A, B, and C.

Then how is it made out that this provision contained in paragraph F is forbidden by law? There is certainly no decision to that effect. No provision has been pointed out in the Companies Act which says that that shall not be done. But it is said that you could not insert such a clause with reference to the objects for which the company is to be established. I agree that in that case such a clause would be invalid; but why? Sect. 8 of the Act of 1862 specifically provides that the memorandum of association shall contain certain things, and, amongst others, the objects for which the company is to be established. That is a provision of the Act which must be complied with in substance and not merely in form. A memorandum which contained, e.g., a provision that the objects of the company should be such as the company might from time to time in general meeting determine would not be a compliance with s. 8. Again, if the memorandum provided that the objects of the company should be certain

(1) 30 Ch. D. 376.

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specified objects numbered A, B, and C, and so on to the end of the alphabet, and then wound up with a general clause "and such other objects as the company may in general meeting determine," that, as it seems to me, would equally fail to comply with the requirements of the statute, and for that reason would be invalid. But the Legislature has not thought fit to require that the company shall in its memorandum state definitely anything as to the priorities of the different classes of shares into which the capital may be divided. All that s. 8 requires to be stated with regard to the capital is the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount, and that requirement is satisfied by clause 5 of the memorandum in the present case.

In these circumstances it seems to me that there is nothing which entitles the Court to say that such a clause as paragraph F of clause 6 is forbidden by law, and, in fact, I think that if we were so to hold we should be departing from what was laid down by this Court in *Andrews* v. *Gas Meter Co.* (1) There the memorandum stated that the nominal capital of the company was "60,000*l.*, divided into 600 shares of 100*l.* each, every share being sub-divisible into fifths, with power to increase the capital as provided by the articles of association." The company issued preference shares in accordance with the articles of association, which were altered for that purpose, and it was held that that was valid. Lindley L.J., in giving the judgment of the Court, after referring to *Harrison* v. *Mexican Ry. Co.* (2), before Jessel M.R., and *In re South Durham Brewery Co.* (3) and *In re Bridgewater Navigation Co.* (4), both before the Court of Appeal, said (5): "These decisions turned upon the principle that although by s. 8 of the Act the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional

(1) [1897] 1 Ch. 361.
(2) (1875) L. R. 19 Eq. 358.
(3) (1885) 31 Ch. D. 261.
(4) (1888) 39 Ch. D. 1.
(5) [1897] 1 Ch. 369.

capital may be raised are matters to be regulated by the articles of association rather than by the memorandum, and are, therefore, matters which (unless provided for by the memorandum, as in *Ashbury* v. *Watson* (1)) may be determined by the company from time to time by special resolution pursuant to s. 50 of the Act." Now, that principle seems to me to apply here, for the rights of the various classes of shareholders are by the memorandum of association made subject to alteration by reference to the articles of association.

On these grounds I think that the point which was raised for the appellants ought not to prevail; and in other respects I agree with the judgment of Buckley J.

The only point which strikes me with regard to the fairness of the arrangement is this, that at first sight it does seem as if the rights of the preference shareholders had been somewhat seriously trenched upon. But when we find such a clause in the articles of association as clause 52, and, moreover, that these alterations in the rights of the various classes of shareholders have been considered, first of all, by a committee consisting of business men chosen by the shareholders themselves, and that they have subsequently been sanctioned by large majorities at the various meetings of shareholders which have been held, it would require a very strong case to induce this Court to interfere. I entirely agree with what has been said both by Buckley J. and by this Court on the present occasion, that in all these cases the Court is not under an obligation to confirm any scheme for reduction, by whatever majorities it may be sanctioned, but has a discretion which it is bound to exercise in a proper case. But, at the same time, in exercising that discretion, when we find that the determination of such matters as variations in the rights attached to different classes of shareholders has by the constitution of the company been left to the decision of the shareholders themselves, the Court ought to be very careful how it interferes with the bonâ fide judgment of business men on a matter of business in which they themselves are largely interested. It has been suggested that the shareholders voted under the influence of a statement

(1) 30 Ch. D. 376.

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made in a circular issued by the directors, that if this course were not adopted the payment of dividends would be indefinitely postponed. But when we find that by clause 122 of the articles of association it is left to the company to determine what amount shall be distributed amongst the members by way of dividend, and that, by clause 124, no larger dividend shall be declared than is recommended by the directors, and we also find that the directors have taken the view that in the present state of the authorities it would be unwise for them to act upon some cases—such as *Lee* v. *Neuchatel Asphalte Co.* (1) and *Verner* v. *General and Commercial Investment Trust* (2)—which, though they are binding on this Court, have not received finally the sanction of the House of Lords, and, as appears from what was said in *Dovey* v. *Cory* (3), may in any event require great care in their application, it seems to me impossible to say that that statement in the circular was such a departure from the law as to compel us to hold that the sanction of the shareholders was obtained unfairly. I think it was a matter which might reasonably and properly be taken into consideration by those to whom the circular was addressed.

I agree with what was said by Buckley J., and I think, therefore, that the appeal fails.

Solicitors: *Ashurst, Morris, Crisp & Co.; Francis & Johnson.*

(1) (1889) 41 Ch. D. 1. (2) [1894] 2 Ch. 239.
(3) [1901] A. C. 477.

W. L. C.

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C. A. 1903

[1902 C. 2700.]

Nov. 13, 16; *Dec.* 21.

Company — Mortgage — Registration — "Charge created by the Company" — Debenture Stock — Covering Deed — Sale of Part of Mortgaged Property — Substitution of other Property — Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

Debenture stock issued by a company was secured by a covering deed, executed in 1897, under which the trustees had power, at the request of the company, to sell any part of the mortgaged premises, which included freeholds and leaseholds of the company. The freeholds and leaseholds were described as "the specifically mortgaged premises," and the proceeds of any sale of those premises were to become part of those premises, and were to be applied by the trustees, at the request of the company, in the purchase of (inter alia) any leasehold hereditaments, which were to be assured to the trustees and held by them upon the trusts declared by the covering deed of the specifically mortgaged premises, and were to be deemed to form part of those premises.

Some of the leaseholds comprised in the covering deed having been sold, the trustees, at the request of the company, agreed to apply 2700*l.*, part of the proceeds of sale, in the purchase of a leasehold public-house. By a lease dated March 14, 1902, in consideration of 2700*l.* paid by the company out of their own funds to the lessor, the public-house was demised to them for a term of 1001½ years, at a yearly rent and subject to covenants by the lessees. On August 18, 1902, by a deed which was described as supplemental to the covering deed, the company, in consideration of 2700*l.* paid to them by the trustees, out of moneys held by them under the provisions of the covering deed, sub-demised the public-house to the trustees for the residue of the term (except the last day thereof) upon the trusts of the covering deed concerning the specifically mortgaged property and as part of that property, as if the same had been originally comprised in and demised to the trustees by the covering deed:—

Held, that by the sub-demise a charge was created by the company within the meaning of s. 14 of the Companies Act, 1900, and that the sub-demise must be registered under that section.

Decision of Byrne J., [1903] 2 Ch. 527, affirmed.

Per Stirling L.J.: When the leasehold public-house had vested in the company, it became part of their assets over which the trustees of the covering deed had by virtue of that deed a floating, not a specific, charge, and on the execution of the sub-demise and payment of the 2700*l.* by the trustees or the company, the trustees acquired for the first time a specific charge on the public-house, namely, a security of a different

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kind from that which previously existed. Consequently the sub-demise required registration.

Semble, that if the trustees had acquired the lease directly from the lessor, registration would not have been necessary.

APPEAL from the decision of Byrne J. (1)

The Cornbrook Brewery Company in 1897 issued 140,000*l.* mortgage debenture stock, which was secured by a covering deed, dated February 17, 1897, under which the Law Debenture Corporation were appointed trustees for the stockholders, the deed being made between the company and the corporation. As the deed was executed before the passing of the Companies Act, 1900, it did not require registration under s. 14 of that Act.

By clause 1 of the deed it was provided that the words "the specifically mortgaged premises" "mean the hereditaments and premises specified or referred to in the second schedule hereto, and which are to be assured to or vested in the trustees in accordance with clause 8 hereof, and any other hereditaments, assets, and premises which may become vested in the trustees in pursuance of the provisions hereinafter contained, or which ought to be so vested, and 'the mortgaged premises' means and includes the specifically mortgaged premises and the general assets collectively."

By clause 8 the company were forthwith to vest in or cause to be assured to the trustees upon the trusts of the deed the freeholds and leaseholds specified in the 2nd schedule.

By clause 9 the company as beneficial owner thereby charged in favour of the trustees the specifically mortgaged premises with the payment of the stock and the interest thereon as a specific charge and not a floating charge for the payment of those moneys.

By clause 11 the assets and undertaking of the company for the time being, both present and future, other than the specifically mortgaged premises, but including uncalled capital, were to stand charged with the payment to the trustees of the stock and the interest thereon, and the charge was to be a floating security.

By clause 22 power was given to the trustees, at the request

(1) [1903] 2 Ch. 527.

of the company, to sell any part or parts of the specifically mortgaged premises.

By clause 23 the trustees were to hold the proceeds to arise from any sale or other dealing with the specifically mortgaged premises, "which proceeds shall become and be part of the specifically mortgaged premises," upon trust, at the request of the company, to apply the same, if they should think fit, in (inter alia) the purchase or acquiring of any freehold, leasehold, or copyhold hereditaments which might seem suitable for any of the purposes of the company, and which should be assured to or vested in the trustees.

By clause 26, "all property assured to or vested in the trustees in pursuance of the provisions herein contained shall be held by the trustees upon and subject to the trusts, powers, and provisions hereinbefore declared and contained and relating to the specifically mortgaged premises, and shall for all purposes be deemed to form part of the specifically mortgaged premises."

The properties specified in the 2nd schedule were duly assured to the corporation as trustees of the deed.

In November, 1901, the trustees had in their hands moneys arising from the sale of some of the leaseholds forming part of the specifically mortgaged premises, and the company requested the trustees to apply 2700*l.*, part of those moneys, in the purchase of the lease of a public-house called the Exile of Erin. The trustees acceded to this request, and accordingly, by a lease dated March 14, 1902, Margaret Carroll, in consideration of 2700*l.* paid to her by the company, demised the public-house to the company for a term of 1001½ years from November 29, 1901, at a rent of 30*l.* per annum, and subject to the lessees' covenants contained in the lease.

By an indenture of underlease dated August 18, 1902, which was described as supplemental to the trust deed of February 17, 1897, in consideration of 2700*l.* paid to the company by the corporation, out of moneys held by them under the provisions of the trust deed, the company as beneficial owner demised the public-house to the corporation, to hold the same for the residue then unexpired of the term of 1001½ years (except the

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last day thereof) upon the trusts and subject to the powers and provisions declared by and contained in the trust deed of and concerning the specifically mortgaged premises thereunder, and as part of such specifically mortgaged premises as if the same had been originally comprised in and demised to the corporation by the trust deed.

The corporation proposed to register the sub-demise under s. 14 of the Companies Act, 1900; the company brought this action claiming a declaration that the sub-demise did not require registration.

The facts above stated, so far as they differ (if at all) from the statement in the former report, are taken from an affidavit which, by the direction of the Court of Appeal, was made by one of the directors of the company after the conclusion of the arguments upon the appeal.

Byrne J. held that the sub-lease of August 18, 1902, must be registered.

The plaintiff company appealed.

Danckwerts, *K.C.*, and *Manning*, for the plaintiffs. The purchase of the leasehold public-house was intended to be only a reinvestment of the purchase-money of the leasehold property which was sold. By clause 23 of the covering deed of February 17, 1897, the proceeds of sale became "part of the specifically mortgaged premises," and when the sub-demise was made by the company to the trustees no new security was given to them. It is submitted that under these circumstances the sub-demise did not require registration under s. 14 of the Companies Act, 1900. The learned judge held that if the sub-demise had been granted by any one but the company it would not have required registration. It is submitted that this makes no difference; the company did not execute the deed as mortgagors. It is submitted (1.) that this sub-demise is not "a mortgage or charge created by the company" within sub-s. 1 of s. 14 (1) of the Act; and (2.) if it is, it falls

(1) By sub-s. 1, "Every mortgage or charge created by a company after the commencement of this Act and being either—

"(*a*) a mortgage or charge for the purpose of securing any issue of debentures; or

"(*b*) a mortgage or charge on un-

within sub-s. 4, and therefore need not be registered. Under that sub-section only the particulars in it mentioned need be registered in such a case as the present. Here there was nothing more than a change of the investment of the mortgage money. When the first of a series of debentures is issued a charge is created by the company, and, if that was done before the commencement of the Act, debentures of the same series issued after the commencement of the Act need not be registered under the Act: *In re Spiral Globe, Ld.* (*No.* 2) (1) If the Act had been in operation in that case sub-s. 4 would have applied, and only the covering deed need have been registered: *In re Harrogate Estates, Ld.* (2) If sub-s. 4 applies and is complied with, it is not necessary to comply with sub-s. 1. If a second transaction supersedes the first it may be necessary to re-register, but not otherwise. It was not intended by sub-s. 4 to give complete knowledge to

called capital of the company; or

"(*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

"(*d*) a floating charge on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured."

Sub-s. 4: "Provided that where a series of debentures containing any charge to the benefit of which the debenture-holders of that series are entitled pari passu is created by a company, it shall be sufficient to enter on the register—

"(*a*) the total amount secured by the whole series; and

"(*b*) the dates of the resolutions creating the series and of the covering deed, if any, by which the security is created or defined; and

"(*c*) a general description of the property charged; and

"(*d*) the names of the trustees, if any, for the debenture-holders."

Sub-s. 6: "The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured (which certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with), and the company shall cause a copy of the certificate so given to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered."

(1) [1902] 2 Ch. 209.

(2) [1903] 1 Ch. 498.

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the public; the object was to put them on their guard. Under that sub-section it is not necessary to register that which makes the charge effective, for no charge is created till a debenture is actually issued. But under sub-s. 1, if no charge is created no registration is required.

[ROMER L.J. Suppose a debenture was issued which did not charge any property of the company, and a charge was afterwards given to the debenture-holder, would not that charge require registration?]

That would be a new transaction.

[VAUGHAN WILLIAMS L.J. If anything in the nature of a new security is given, will the registration of the covering deed be sufficient?]

In the present case the trustees had in their hands a sum of money which was subject to the charge, and all that was done was to invest it. Whoever made the investment, the debenture-holders got no greater security than they had before.

Kenyon Parker, for the defendants. Sub-s. 4 of s. 14 only applies where a series of debentures containing a charge has been created by the company, and the various particulars required to be entered on the register have been so entered; but here the company has not taken advantage of the protection given by that sub-section. The sub-demise, having been granted by the company and not by the lessor, created a charge within the meaning of sub-s. 1.

The Act, in speaking of an "issue of debentures," seems to contemplate an issue not already made, but to be made in futuro. In *In re Spiral Globe, Ld.* (*No.* 2) (1) the whole issue had taken place.

If the Court should hold registration to be necessary, it can extend the time under s. 15.

Danckwerts, K.C., in reply.

VAUGHAN WILLIAMS L.J. We will consider this case, but before we deliver judgment the facts should be stated with the utmost particularity, so that we may have before us the dates of the transaction and how it was carried out.

Cur. adv. vult.

(1) [1902] 2 Ch. 209.

Dec. 21. The following judgments were read:—

VAUGHAN WILLIAMS L.J. I think that the appeal must be dismissed. I think that the company have created a mortgage or charge after the commencement of the Act for the purpose of securing an issue of debentures within the meaning of s. 14, sub-s. 1, of the Companies Act, 1900. I agree with Byrne J. that the result of the evidence is that property, which, prior to the execution of the deed of August 18, 1902, did not form part of the specifically mortgaged property as contained in the trust deed, thenceforward formed part of the specifically mortgaged property. This conclusion of Byrne J.'s is confirmed by the affidavit of facts made in pursuance of the direction of the Court of Appeal. [His Lordship referred to several paragraphs of that affidavit.] Such, I think, is the right view, although I think with Byrne J. that probably, if there had been a direct purchase from Margaret Carroll, the result might have been different.

STIRLING L.J. I am unable to see my way to differ from the judgment of Byrne J., who has held that the indenture of August 18, 1902, was a mortgage or charge created by the company after the date fixed for the coming into operation of the Companies Act, 1900, and therefore requiring registration in accordance with the provisions of that Act. It appears from the affidavit which has been filed since the argument on the appeal that in November, 1901, the company requested the trustees of the covering deed to concur in the purchase, at the price of 2700*l.*, of a leasehold public-house for a term of 100$1\frac{1}{2}$ years from November 29, 1901, subject to a ground-rent and onerous covenants, and that the trustees agreed to do so, but stipulated that the transaction should be so arranged that the property should be sub-demised to them in such a way that they should not be liable upon the covenants in the lease. Thereupon the company proceeded to carry out the proposed purchase as between themselves and Margaret Carroll, the lessor; and by a lease dated March 14, 1902, she, in consideration of 2700*l.* paid to her by the company, demised the public-house to the company. This sum of 2700*l.* was paid by the

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company out of their own funds. The result of this was that the leasehold house became legally vested in the company, and constituted part of their assets over which the trustees of the covering deed, by virtue of the provisions of that deed, acquired a floating, but not a specific, charge. Matters so continued until August 18, 1902, when the company delivered to the trustees of the covering deed the indenture of that date, and received in exchange from the trustees the sum of 2700*l.*, part of a sum of money held by them on the trusts of the covering deed. In this way the trustees acquired for the first time a specific charge on the property in question, that is to say, a security of a different kind from that which previously existed. I think with Byrne J. that the transaction might have been carried out in such a way as to avoid an assurance to the trustees in the nature of a mortgage or charge requiring registration; but that, in the events which have actually taken place, the company did by the deed of August 18, 1902, create a mortgage or charge, which ought therefore to be registered. Sub-s. 4 of s. 14 of the Companies Act, 1900, was referred to on behalf of the appellants; but, inasmuch as the requirements of that clause have not been complied with, it does not seem to assist them. The appeal must be dismissed.

Romer L.J. has asked me to say that he concurs in the decision.

Solicitors: *Hays, Schmettau & Dunn; Bircham & Co.*

W. L. C.

BYRNE J.
1903
Nov. 13, 30.

In re FRASER.
LOWTHER *v.* FRASER.

[1903 F. 1019.]

Will—Construction—Devise of "Chattels Real"—Rent-charge on Leaseholds—Administration—Unpaid Purchase-money—Intestacy—Next of Kin—Real Estate Charges Acts, 1854 (17 & 18 *Vict. c.* 113), *s.* 1, *and* 1877 (40 & 41 *Vict. c.* 34), *s.* 1.

A rent-charge issuing out of leasehold land held for the residue of a term of years is a "chattel real," which is included in a devise of real estate and chattels real; it is also within the provisions of the Real Estate Charges Act, 1877, so that on an intestacy it passes to the next of kin subject, as between them and the other persons claiming under the deceased, to a primary liability for any mortgage or vendor's lien for unpaid purchase-money, notwithstanding the omission of the words "next of kin" in the subsequent portion of the section negativing the right of "the devisee or legatee or heir" to have these charges satisfied out of other estate.

Adjourned Summons.

This was an application by the present trustees of the will of the late Sir William Augustus Fraser for the direction of the Court upon several matters arising in the administration of his estate; but the only questions argued which call for any notice in this report were those occasioned by the failure, in the events which had happened, of a residuary devise of real estate and chattels real, the first question being whether a rent-charge issuing out of leaseholds was a "chattel real," in which case this rent-charge admittedly passed to the testator's next of kin as undisposed of, when the second question arose, namely, whether this class of property was within the provisions of Locke King's Act, 1854, and Amendment Act, 1877, so as to pass subject to an existing vendor's lien for unpaid purchase-money. The facts, so far as material, were as follows:—

In April, 1898, the testator entered into a contract to purchase for 11,110*l.* a rent-charge of 402*l.* issuing out of and charged upon certain leasehold hereditaments at Boscombe, in

BYRNE J. 1903 FRASER, *In re.* LOWTHER *v.* FRASER.

the county of Southampton, held for a residue of a term of ninety-nine years. In August, 1898, the testator died, and in January, 1899, the trustees of the will completed the purchase and paid the purchase-money out of the testator's general personal estate, the rent-charge being conveyed to the purchasers as trustees of the will, and upon the trusts thereof.

By his will the testator bequeathed all his personal estate not otherwise disposed of, "except any chattels real," to his trustees upon certain trusts for conversion, investment, and accumulation which were still subsisting, and under which a strict settlement was created in favour of various named beneficiaries. The testator also devised and bequeathed "all real estate and chattels real in England" to which he might be entitled at his death to his brother Charles Crauford Fraser absolutely for all his estate and interest therein.

Charles Crauford Fraser predeceased the testator. Differences of opinion having arisen between the testator's next of kin and the beneficiaries under the settlement of the personal estate as to the ultimate destination of this rent-charge, the trustees of the will took out the present summons for the determination by the Court of these questions.

Hon. F. Russell, for the trustees.

Levett, K.C., and *L. W. Byrne*, for Sir Keith Alexander Fraser, the first tenant for life and one of the testator's next of kin. That this rent-charge is a chattel is admitted, and being a rent-charge issuing out of land held for a term of years it is within the definition given in Godolphin's Orphan's Legacy, ed. 1685, p. 121 (3), of chattels real without life and immovable which go to the executors; and in Termes de la Ley, ed. 1671, pp. 106 and 107, "Catals." Consequently this rent-charge, being undisposed of, passes to the next of kin. Further, we say that this class of property is not caught by the provisions of Locke King's Acts. The words in s. 1 of the Amendment Act, 1877, are, "any land or other hereditaments of whatever tenure." This rent-charge is not land; it is not a hereditament that passed to the heir on an intestacy, just as an advowson or any other hereditament granted or devised to one and his heirs for 100

years: Wentworth on Executors, 14th ed. p. 136; Challis' Law of Real Property, 2nd ed. 43. This rent-charge therefore passes to the next of kin free from any liability for vendor's lien, and the next of kin are entitled to have the purchase-money paid, as has already been done, out of the testator's general personal estate.

T. H. Carson, K.C., and *Waggett*, for another of the next of kin, adopted the above argument and referred to Co. Litt. 118 b, and Blackstone, vol. ii., 12th ed. 1794, p. 386, as giving additional definitions of chattels real. Chattels real are not so called as being real estate, but because they are extractions out of the real: *Ridout* v. *Pain*. (1) A rent for life granted out of a term of years in lands has been held to be a chattel in *St. Auby's Case* (2) and in *Saffery* v. *Elgood*. (3) According to these old authorities, therefore, this rent-charge is a chattel real: the testator has used a technical word, which in the absence of any qualifying context must have its technical meaning: *Leach* v. *Jay*. (4)

Assuming that this rent-charge is a hereditament of tenure within the meaning of the earlier part of s. 1 of the 1877 Act, still we say it is not within the subsequent words of the section, which omits all reference to "next of kin." These Acts have always been construed very strictly. In *Solomon* v. *Solomon* (5) and *In re Wormsley's Estate* (6) the reference to devisees and heirs in the negativing clause was held to exclude leaseholds from the operation of the 1854 Act. In *Hood* v. *Hood* (7) vendor's lien was held not to be included; and in *In re Cockcroft* (8) the narrower language of the second part of the section was held to control the effect of the earlier words in this section of the 1877 Act; and though a legatee of leaseholds has been held liable to discharge any incumbrance—*In re Kershaw* (9)—on the strict wording of this Act, there has been no decision that one of the next of kin in such a case would be liable.

(1) (1747) 3 Atk. 486, 492.
(2) (1589) Cro. Eliz. 183.
(3) (1834) 1 A. & E. 191; 40 R. R. 280.
(4) (1878) 9 Ch. D. 42.
(5) (1864) 33 L. J. (Ch.) 473.
(6) (1876) 4 Ch. D. 665.
(7) (1857) 26 L. J. (Ch.) 616.
(8) (1883) 24 Ch. D. 94.
(9) (1888) 37 Ch. D. 674.

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Rowden, K.C., and *Leeke*, for another of the next of kin, adopted the above argument.

Norton, K.C., and *Merivale*, for the first tenant in tail, and as representing persons claiming under the will. By the use of the words "chattels real in England" the testator meant his leaseholds; these words were not intended to cover a mere chattel interest in land like this rent-charge. In former times property consisted of physical objects only, which were divided into two classes—land and chattels. Certain interest in land, such as advowsons and leaseholds, subsequently became chattels real, but they were physical interests accompanied by a right of occupancy. Physical occupancy was essential: this seems to be so from the instances given in Co. Litt. 118 b. None of the text-books say that a rent is anything more than a chattel; it is the right of entry or the entry into possession that makes the chattel interest a chattel real: *Jemmot* v. *Cooly* (1) and Davidson's Precedents, 3rd ed. vol. iii. Part I. p. 315. There is no reason here for extending the meaning of chattel real so as to include a rent-charge of this kind. This rent-charge accordingly was not included in this general devise of residuary real estate, and therefore there is no intestacy.

But assuming we are wrong on this point, then we say this rent-charge is within the provisions of the Acts of 1854 and 1877, and passes to the next of kin subject to the liability of paying the unpaid purchase-money. Leaseholds are not hereditaments of any tenure, but the Act of 1877 has been held to apply to leaseholds; the words "land or other hereditaments of whatever tenure" ought to be read as "of whatever tenure, if any," in the manner decided by Lord Bramwell in *Great Western Ry. Co.* v. *Swindon and Cheltenham Extension Ry. Co.* (2), where he was dealing with similar words defining "lands" in Lands Clauses Act, s. 3. Therefore this interest in leaseholds is within the first portion of s. 1, and, though the subsequent words do not include "next of kin," still it is most unlikely that the Legislature should have meant to provide that a legatee should take the gift cum onere, but that in the case of an intestacy the next of kin should be under no liability.

(1) (1665) 1 Lev. 170. (2) (1884) 9 App. Cas. 787, 808.

Further, the Acts of 1854 and 1877 have now to be read together, and by the 1854 Act, s. 1, it is provided that the land or hereditaments so charged "shall as between the different persons claiming through or under the deceased person be primarily liable to the payment, &c."—words sufficiently wide to cover this case. Why should they be cut down simply because "next of kin" are not mentioned in the negativing clause of the 1877 Act? The wording of this portion of the 1854 Act ought to have full effect given to it so far as concerns all property falling within the scope of the enactment as a whole. The next of kin, therefore, if they take this rent-charge, must take it subject to the liability to discharge the unpaid purchase-money.

T. H. Carson, K.C., in reply. None of the older authorities or the judges in defining a chattel real make any reference to any right of occupancy, possession, or right of entry.

[*Johns* v. *Pink* (1), where the nature of the rights acquired by entry is dealt with, and Williams on Executors, 9th ed. p. 592, and *Pinchin* v. *London and Blackwall Ry. Co.* (2) were referred to.]

Cur. adv. vult.

Nov. 30. BYRNE J., after stating the facts as to the contract for the purchase of this rent-charge and the devise of the real estate and chattels real, continued:—Questions have arisen between the next of kin of the testator and the parties beneficially entitled to the personal estate under the will—(1.) whether or not the interest which the testator had contracted to purchase was a chattel real, in which case the testator died intestate in respect thereof; and (2.) if so, whether the chattel real passes subject to a liability to discharge the vendor's lien for the purchase-money, or whether the payment of the purchase-money is properly to be borne by the testator's general personal estate. Upon the first point I have no doubt that the rent-charge contracted to be purchased is a chattel real. That it is a chattel is not contested; and, being a rent issuing out of land held for a term of years, it comes

(1) [1900] 1 Ch. 296. (2) (1854) 5 D. M. & G. 851.

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within the definition of a chattel real as given first in Co. Litt. 118 b: "Reall, because they concerne the reality, as tearmes for yeares of lands or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by elegit, and such like." Then in Termes de la Ley, ed. 1671, pp. 106 and 107, it is stated: "Catals are either real or personal. Catals real are either such as doe not immediately appertain to the person, but to some other thing by way of dependance; as a box with writings of land, the body of a ward, the apples upon the tree, or the tree itself growing upon the ground. Also such as are issuing out of some thing immovable to the person, as a lease for rent or term of years." In Preston on Abstracts of Title, at p. 446 of vol. i. of the edition of 1823, there is this statement: "Annuities by way of rent-charge are frequently granted to a person and his heirs for a life or lives, instead of being granted for years, determinable with the decease of a person, or the decease of the survivor of several persons. When such annuity is derived out of, and depends on, a freehold interest, the annuity will, on intestacy, be transmissible, and belong to heirs, and not to executors or administrators: at least such is the opinion entertained on mature deliberation. But every annuity granted out of a chattel interest will be a chattel interest, although it be limited to the grantee and his heirs for a life or lives. An interest which in its nature is a chattel real cannot be rendered transmissible to heirs." In Godolphin's Orphan's Legacy (edition of 1685), Part II. c. 13, dealing with divisions of chattels into chattels real and chattels personal, I find s. 2 deals with chattels real, living, and movable, and s. 3 runs: "The chattels real without life and immovable, that go to the executors, are generally and for the most part in houses or lands, by lease," &c.; and then after enumerating certain other things the text proceeds: "Also a lease for years determinable upon lives, which is a chattel, and shall go to the executor; as also doth an extent upon a statute. Likewise if a termer for years grant his term by bequest or otherwise to A. and his heirs: if A. dies, his executors, not his heirs, shall have it, for it is no inheritance. Or if such a termer grant a rent out of the land to A. and his

heirs, or the heirs male of his body, yet shall it go to the executor, not to the heir; for it being derived out of a chattel, itself remains a meer chattel, and becomes not any inheritance." There are other authorities which have been referred to in the course of the argument, but they neither add to nor diminish the effect of those I have mentioned. To the suggestion that possibly the words "chattels real" in the will might be construed in the limited sense of lands held for a term of years, I think that the answer is that technical words are to receive their proper technical meaning in the absence of context importing that they are to be construed otherwise: see *Leach* v. *Jay*. (1) In the present case there is no such context. I cannot say either that the fact that the bequest refers to chattels real in England is sufficient to exclude the rent-charge from the bequest. I think that the reference to locality in regard to a rent-charge issuing out of land is not so inappropriate to the subject-matter when the land out of which the rent-charge issues is situate in the place named, as to except it from the operation of the gift. The second point depends upon the construction to be put upon Locke King's Act, 1854 (17 & 18 Vict. c. 113), and the amending Acts, 30 & 31 Vict. c. 69 (1867), and 40 & 41 Vict. c. 34 (1877). Under the first of these Acts it was determined that it did not extend to leaseholds: *Solomon* v. *Solomon* (2) and *In re Wormsley's Estate* (3); and also that it was not applicable where the only charge was by way of vendor's lien. The Act of 1867 extended the operation of the original Act to the case of a vendor's lien, but not where the purchaser died intestate: *Harding* v. *Harding* (4); and the Act of 1877 has further extended such operation to the case of leaseholds: *In re Kershaw* (5); and in the case of a vendor's lien to intestate's estates as between the devisees of real estate subject to a vendor's lien, and the next of kin of a testator who died intestate as to personalty: *In re Cockcroft*. (6) So far the case is governed by authority. I respectfully agree with the

(1) 9 Ch. D. 42.
(2) 33 L. J. (Ch.) 473.
(3) 4 Ch. D. 665.
(4) (1872) L. R. 13 Eq. 493.
(5) 37 Ch. D. 674.
(6) 24 Ch. D. 94.

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observation of Kay J. in the last-mentioned case, to the effect that these Acts do not afford a favourable specimen of legislation, and I am bound to say that it is not easy to interpret the language used in reference to the circumstances which have arisen in the present case. It is to be noticed that the Act of 1877 only extends the operation of the original Act in the case of a testator or intestate dying seised or possessed of or entitled to "any land or other hereditaments of whatever tenure," and not in the case of a testator or intestate dying seised of or entitled to "any estate or interest in any land or other hereditaments," which is the phrase first used in the Act of 1854. Inasmuch, however, as the words "such land or hereditaments" and "the land or hereditaments so charged" are subsequently used in the same section in speaking of the same subject-matter, I do not think that too much stress ought to be placed on this variation of expression, but while either expression would be clearly sufficient to include leaseholds the words "land or other hereditaments of whatever tenure" in the Act of 1877 do not seem well chosen to describe a rent-charge issuing out of land held for a term of years. I think, however, the words are sufficient, having regard to the words I have referred to as first used in the Act of 1854, and but for the absence of any reference to next of kin in the clause negativing the right of the devisee, legatee, or heir to have the sum discharged out of other estate, the question would be comparatively simple of solution; but this undoubtedly gives rise to very great difficulty. In the cases of *Solomon* v. *Solomon* (1) and *In re Wormsley's Estate* (2) it was held that the reference only to devisees and heirs in the negativing clause was sufficient, notwithstanding the earlier expressions in the Act, to confine its operation to real estate. That was in reference to subject-matter; but, having regard to the scope and intention of the Act of 1877, as shewn by the earlier part of it, I do not think that I am driven to limit the generality of the last words in the Act of 1854, "but the land or hereditaments shall as between the different persons claiming through or under the deceased person be primarily liable to the payment, &c." (there being

(1) 33 L. J. (Ch.) 473. (2) 4 Ch. D. 665.

no question as to subject-matter), because the next of kin are not referred to in the negativing clause of the Act of 1877. The drafting is very unhappy, but, upon a full consideration of the case, I think the fair and true interpretation is that, as to all property within the scope of the enactments, the last words which I have quoted from the Act of 1854 ought to have their full effect, notwithstanding the previous omission of any reference to next of kin. This construction avoids the necessity of imputing to the Legislature the extraordinary intention that the property given should, in the hands of the next of kin taking in consequence of lapse by the death of the legatee in the testator's lifetime, take free from a liability which, had the legatee survived, it would have been liable to in his hands. I therefore hold that the next of kin take the rent-charge as persons claiming through the deceased person, such rent-charge being subject, as between them and the other persons claiming through the deceased person, to a primary liability to payment of the amount of the vendor's lien.

Solicitors: *Rowcliffes, Rawle & Co; Bompas, Bischoff, Dodgson, Coxe & Bompas; Fox, Trotter & Co.*

W. C. D.

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In re BROWN.
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[1903 B. 2056.]

Will—Construction—Marriage with Consent—Consent given—Power of Retractation.

A person in loco parentis is justified in altering his mind and withdrawing his consent to a marriage, if circumstances subsequently come to his knowledge which, had they been known at the time, would have caused him originally to withhold his consent. This power of retractation, however, is not unlimited, and cannot be exercised for mere caprice or without just and exceptional reasons.

Merry v. *Ryves*, (1757) 1 Eden, 1, and *Dashwood* v. *Lord Bulkeley*, (1804) 10 Ves. 230, discussed and applied.

By a codicil made in 1891 a testator directed that, in the event of his daughter marrying against her mother's wish, a legacy of 500*l.* and her share in his residuary estate were to be settled on the daughter for life, with remainder to her children. In May, 1893, the daughter became engaged with the consent of the testator and his wife, conditionally on the marriage being deferred for two years. In February, 1895, the testator died; the engagement was still recognised by the widow, who stipulated for a further delay till August. To this the daughter agreed. Subsequently there were disputes between the mother and daughter as to the form of the settlement and other matters; the daughter left her mother's house, and was married in June. Immediately before the marriage the mother wrote withdrawing her consent to the marriage:—

Held, that under the circumstances the consent originally given could not be withdrawn, and that the daughter was absolutely entitled to the legacy and to her share in the testator's residuary estate.

ADJOURNED SUMMONS.

This was an application under Order LV., r. 3, by Mrs. Lillias Ingall, the wife of Francis Drew Ingall, a daughter of the testator, Robert Barclay Brown, and a legatee under his will, which raised the question whether a settlement of her interest, made by a codicil in the event of her marriage "against her mother's wish," took effect, and, incidentally, whether a consent to her marriage having been once given it could subsequently be withdrawn.

This summons was put into the witness list for the cross-examination in Court of the various deponents upon their

affidavits; but at the trial the facts were, by arrangement between counsel, mainly proved from the correspondence which had passed between different members of the plaintiff's family and the various solicitors for the parties, and none of the deponents were cross-examined. The result of this evidence, the admitted facts, and the facts as found by the Court, where not admitted, were shortly as follows:—

The testator by his will of August, 1888, gave all his property, real and personal, to trustees upon trust, subject to the usual direction for payment of his debts, funeral and testamentary expenses, for his wife for life, and after her decease he devised and bequeathed the same unto and to be equally divided between "all and every my children, sons and daughters, who shall be living at the time of the decease of my dear wife and the issue of them as shall be dead, such issue nevertheless taking only the share which their deceased parent would have been entitled to in the event of such parent surviving my dear wife, to and for their own use and benefit absolutely." By a codicil, also made in 1888, the testator gave several legacies, including one of 500*l.* to his daughter Lillias. In 1890 or 1891 the testator made a second codicil as follows: "Since writing the above, my last will, I have to add that it is my wish that in the event of my youngest daughter Lillias marrying against her mother's wish that she shall not be paid the above legacy of 500*l.*, but shall receive only the interest of the same half-yearly Government annuities; this also to apply to all her share of moneys from my estate, and at her death the same to be invested for her children; should she have no issue, then at her death her share of the estate to be divided equally between her brother Kenneth and her sister Mabel."

It was admitted that, some time prior to the date of this second codicil, there had been a possibility of the plaintiff becoming engaged to a gentleman, other than her present husband, who was not considered desirable by the testator and his wife. In May, 1893, the plaintiff became engaged to her present husband: this fact was made known to the testator and his wife, and their consent was given to the engagement provided the wedding was put off for two years, as the intended

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husband's financial position was known to them and was considered not to be sufficiently good to enable him to marry; their consent was also given that the engagement might be made public, so that thenceforward the young people were put in the position, not only as between themselves, but in the face of the world, of an engaged couple. Some time prior to the testator's death his attention was directed to the fact that the intended husband, Mr. Ingall, who was on the Stock Exchange, had had some losses in business, and also that there was a possibility that circumstances of this kind might prevent the marriage from taking place as soon as had been originally anticipated; but up to the time of the testator's death nothing was said or done to cancel the engagement, or to cause any withdrawal of the consent which had been given.

In February, 1895, the testator died. The engagement was still recognised by the widow, but she stipulated that the marriage should not take place till August, so as to allow six months to elapse from the testator's death: this was acceded to. Soon afterwards disputes arose between the plaintiff and her mother, mainly about the form of the settlement to be executed by the plaintiff on her marriage, the mother having become aware for the first time of the amount of Mr. Ingall's liabilities. A good deal of correspondence passed between the solicitors advising the plaintiff and her intended husband and the mother's solicitors as to the settlement, the main subject of dispute being whether the plaintiff should have a power by will, independently of her mother, to give her intended husband a protected life interest in the income of her property. The mother insisted upon a settlement, and insisted on the husband being excluded except with her consent from any interest in his wife's fortune. The intended husband was quite willing that everything should be settled upon the plaintiff and her children; but the plaintiff considered her mother's contention unreasonable, and she eventually left her mother's house to stay with a relative, and arranged to be married on June 22.

On June 21 the plaintiff's solicitors wrote to the mother's solicitors as follows: "We repeat again the offer made in our

letter of yesterday that her property should be settled, and that she should have power by will to give her husband a protected life interest. There is no time to prepare a marriage settlement, but marriage articles could easily be drawn by you and signed either to-day, or even to-morrow morning." The reply to this was: "We have seen our clients, and can only repeat what we said yesterday, that, having regard to all the circumstances, and particularly to the fact that the wedding has been fixed for to-morrow, Mrs. Barclay Brown refuses her consent to the marriage, and that Miss Barclay Brown is therefore marrying against her mother's wish."

The contents of this letter were communicated to the plaintiff. The marriage, nevertheless, was solemnized on June 22.

The trustees of the will had invested the 500*l.* legacy in Consols, and had paid the income of it to the plaintiff from the date of the marriage to the present time.

The plaintiff now took out an originating summons for the determination by the Court of the questions whether, upon the true construction of the will and codicils and in the events which had happened, she was now absolutely entitled to the 500*l.* legacy, and to the share in the testator's residuary estate, in the event of her surviving her mother.

The respondents to this summons were the present trustees of the will—of whom the mother was one—the plaintiff's brother and sister, and the two infant children of the plaintiff's marriage, who were added by amendment before the case came into Court.

Rufus Isaacs, K.C., and *F. Cassel*, for the plaintiff. The testator's consent was given to this marriage, and after his death the widow recognised the engagement and gave her consent to the marriage. A consent of this kind when once given cannot be withdrawn, except for just and exceptional reasons, which do not exist in the present case: *Lord Strange* v. *Smith*. (1) The Court has always put a favourable construction on these clauses in restraint of marriage: *Daley* v.

(1) (1755) Amb. 263.

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Desbouverie (1); *Campbell* v. *Lord Netterville* (2), which is a very strong case.

Consent to this marriage, having been obtained without any fraud or misrepresentation, cannot be retracted out of mere caprice: *Merry* v. *Ryves*. (3) This case is precisely in point. In any event, consent has been substantially given as in *Daley* v. *Desbouverie* (1) and *In re Smith* (4), where the principle of *Daley* v. *Desbouverie* (1) was acted upon. It is admitted that the mother consented to this marriage provided it took place in August, six months after the testator's death. As a fact, she never objected to the marriage, but only to the time ultimately selected for it. *Dashwood* v. *Lord Bulkeley* (5) is distinguishable. In that case a conditional assent was given, and the condition was not performed. In the present case the only condition to a consent to this marriage was that the plaintiff and her intended husband should defer the proposed marriage for two years. This condition was carried out. The consent once given could not be retracted, and the marriage did not take place "against the wish" of the mother. The plaintiff, therefore, is absolutely entitled to the 500*l.* legacy, and to her share of the residue if she survives her mother, and the second codicil does not take effect.

Since the codicil was executed the testator had himself consented to this marriage, so that the widow's consent became immaterial: *Parnell* v. *Lyon*. (6)

[*Clarke* v. *Parker* (7) was also referred to.]

Levett, *K.C.*, and *Peterson*, for the plaintiff's brother Kenneth. The decision in *Lord Strange* v. *Smith* (8) seems to have gone upon the ground of fraud in the trustee withdrawing his consent, and also in *Daley* v. *Desbouverie* (1): see *Clarke* v. *Parker*. (9) At any rate, in the present case there is nothing to shew that the mother "induced" this engagement.

Though consent to this engagement was given by the

(1) (1738) 2 Atk. 261.
(2) (1737) Cited 2 Ves. Sen. 534.
(3) 1 Eden, 1.
(4) (1890) 44 Ch. D. 654.
(5) 10 Ves. 230.
(6) (1813) 1 V. & B. 479; 12 R. R. 274.
(7) (1812) 19 Ves. 1; 12 R. R. 124.
(8) Amb. 263.
(9) 19 Ves. 17, 18.

testator in his lifetime, still he left the second codicil unrevoked, knowing that it would enable his wife to protect their daughter should she make an improvident marriage. The legacy and share of residue being settled upon the plaintiff and her children, it is not a case of forfeiture of the daughter's interest should she marry without consent, as in so many of the cases cited. The only question in dispute as to the proposed settlement was a life interest to the husband, and, having regard to the husband's financial position, the point was an essential one for the mother to insist upon, and it was absolutely necessary to protect the wife and children that a proper settlement should be executed. As a fact, we say the marriage took place "against the mother's wish." She was not satisfied with the terms of the settlement proposed. She therefore refused her consent, as she had a right to do. Even if she had originally consented, she had a right to retract that consent when the circumstances as to the husband's financial liabilities came to her knowledge: *Dashwood* v. *Lord Bulkeley*. (1) The circumstances of this case fully justified this retractation. The present case is entirely different from all the cases relied on by the plaintiff's counsel, because here there is no forfeiture of the daughter's interest. The codicil effects a perfectly satisfactory settlement on the plaintiff and her children.

The only consent the widow ever gave to this marriage was conditional on its not taking place till August: when it became evident that the plaintiff was not going to comply with that condition, the mother was entitled to withdraw her consent, and, on the authority of *Dashwood* v. *Lord Bulkeley* (1), the Court ought not to interfere in a case of this kind.

Sampson, for the plaintiff's infant children, adopted this argument.

Romer, for the trustees of the will.

Cassel, in the course of his reply, stated that the plaintiff and her husband were willing that the share in the testator's residue should be settled in accordance with the terms proposed at the time the marriage took place.

(1) 10 Ves. 230.

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BYRNE J. This application raises a question which it is unfortunate should ever have come into Court for decision, and it is one of some difficulty. It arises in this way. [Having stated the will and codicils, the facts, and the result of the evidence as given above, his Lordship continued :—]

The marriage having taken place at the time, and under the circumstances described, the question is whether under this second codicil the settlement made by the testator of his daughter's interest in the event of her marriage against her mother's wish operates; or whether in fact, having regard to all the circumstances, the marriage ought not to be deemed a marriage with consent.

Several of the older authorities have been referred to in reference to clauses of forfeiture upon marriage without consent, and this much one gathers from the authorities without difficulty; as is observed by Stirling J. in *In re Smith* (1), that from an early period the Court in dealing with cases of this kind has treated the consent to be given to a marriage as a matter, not of form, but of substance, and where it has been found that substantially the consent has been given, it has not looked very minutely into the form which the consent has taken. Here there is no question about the original consent having been given, and having been given in the lifetime of the father. It is said that the codicil operates as from the death of the testator, that he had known for nearly two years before his death that there was a subsisting engagement between his daughter and Mr. Ingall, and that the testator, if he no longer desired his codicil to have any operation, could have made a fresh codicil or revoked the existing one. It is said also that the testator may have had in mind that circumstances might arise under which the subsisting engagement would be broken off, and that the young lady might intend to contract a new marriage, which would be a proposed marriage similar to that which apparently he had objected to before any question of the engagement to Mr. Ingall came on; but after all, though it is right to see what the circumstances were at the time when the codicil was

(1) 44 Ch. D. 658.

executed, what I have to do is to construe it as it stands, and, as the document is before me, to see what the operation of it is. It was also urged that this is not a forfeiture clause in the sense that all the interest conferred upon the young lady is to go over to somebody else upon the event happening, but in fact it is a provident disposal of his own property by way of settlement in case of an improvident marriage being made. In some of the cases that have been cited the clause of forfeiture did not give away the whole of the interest that had been originally given: in one case particularly it gave the fund to the lady for her separate use independently of her husband; but it is a fair observation to make that this is not one of those strict clauses of forfeiture depriving the daughter of all interest under her father's will.

With those remarks I will now consider how the authorities stand with reference to the withdrawal of a consent once given. The first case I refer to is *Merry* v. *Ryves*. (1) In that case there were trusts "to raise by sale or mortgage 1000*l*. each for the sisters of George Ryves (of whom the plaintiff's mother was one) to be paid them respectively, at and upon their respective days of marriage, so as they respectively married with the consent of the said George Ryves, Ann Ryves, their mother, and Thomas Heysham, and the survivors or survivor of them; but in case any or either of them should marry without such consent it was declared that she or them so marrying, should not receive such 1000*l*., neither should any money be raised for or paid to her or them so marrying without consent." From the evidence it appeared that the plaintiff's father was a man of fortune, and had paid his addresses to a Miss Ryves. He wrote to Mr. George Ryves, her brother, asking for his consent, and George Ryves said, "The proposal he made, though late, he should not oppose; that his character and circumstances were extraordinarily good; that he should leave the management of the settlement to Mr. Brucer, and that he would abide by Mr. Brucer's agreement on the settlement." The articles were prepared; the mother and trustee consented, the mother being a witness. Then: "Before the marriage

(1) 1 Eden, 1.

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some difference arising between Mr. Merry and the brother, the latter absolutely forbad the marriage; and it appeared that Mr. Merry in a letter to the brother, gave up his addresses, and wished the lady a better husband. Some time after, however, without any further application to the brother, the marriage was had, and now, the plaintiff's father and mother being dead, and the plaintiff the only child of the marriage, the question was, whether he is entitled to have the 1000*l.* raised and paid to him." The Lord Keeper, Lord Henley, in giving judgment says (1): "The Court has always in cases of this nature considered the question of consent with great latitude, adhering to the spirit and not the letter. The maxim Qui tacet satis loquitur has therefore been respected, and constructive consents have been looked upon as entitled to as much regard as if conveyed in express terms." And then later he says: "I must consider what appears to have been done by Mr. George Ryves as a consent given by him to Mr. Merry's marriage. The question then will be, whether such consent could be afterwards retracted; and I am of opinion that it could not, though I think that it might have been if it had been obtained through any deceit or fraud; but nothing of that kind appears, or is even imputed in the present case. Here is no suppressio veri, or suggestio falsi, or any misrepresentation whatsoever. A plain constructive consent is given on a settlement being made, and this is referred to Mr. Brucer; and though there was afterwards some altercation about the settlement, yet a reasonable one is made. Here is 3000*l.* settled for her 1000*l.*, and the whole is done with the approbation of Mr. Brucer, which makes the consent pure ab initio"—that is to say, the condition that was imposed was fulfilled. Then in the next paragraph he says: "It must be taken therefore that here there was a consent; and this consent being pure ab initio, not obtained by any fraud or misrepresentation, I am of opinion that it could not be retracted. It would otherwise be a most cruel thing to suffer young persons to contract and entertain affection, and then ad libitum withdraw the consent."

In *Dashwood* v. *Lord Bulkeley* (2) the Lord Chancellor, Lord

(1) 1 Eden, 5. (2) 10 Ves. 230, 242.

Eldon, says, in the course of his judgment, after referring to a certain passage in the case of *Farmer* v. *Compton* (1): "These are very material words; for it would be very dangerous, as a general principle, notwithstanding all the colour there is for saying it has been acted upon, to hold, that, if at a particular time a person in loco parentis, as guardian, upon a conscientious sense of duty thinks himself required to give consent, and previously to the marriage is duly informed of circumstances, that ought to have operated at first to make him withhold his consent, if he has once given it, he shall not afterwards alter his mind. The cases have gone this length; that, if consent is once given, it shall not be withdrawn by adding terms, that do not go to the propriety of giving the consent"; and then he proceeds to deal with the case of *Lord Strange* v. *Smith*. (2)

Now, what I understand to be the true meaning of the principle which underlies the observations which I have just read is this: that it must be justifiable for persons in loco parentis to change their minds if circumstances come to their knowledge in respect of the proposed husband which, if they had been within their knowledge at the time the consent was given, would have fairly and properly operated to induce them not to give their consent; and that then the rule about non-retractation would not be held to apply. On the other hand, I think this also is to be gathered—that a retractation of consent must not be, as was expressed in one case, ad libitum, or, as it was, I think, expressed in another case, a mere caprice; but in arguing this case the parties representing the mother were compelled to put their case as high as this, namely, that there was an absolute power on the part of the mother to express her wish against the marriage notwithstanding the previous consent. In my opinion the mother had no power to revoke this consent. There was a consent given by the father and the mother. There is no suggestion of any want of moral character or the existence of any circumstance of that nature which would have prevented the parents giving their original consent. One thing that could be said was that to the mother the

(1) (1625) 1 Rep. Ch. 1. (2) Amb. 263.

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amount of the indebtedness of the young man became known for the first time after the testator's death; and another is that the young people had assented to what the mother told them she should make a condition, namely, that the marriage was not to take place until August. I must read this clause fairly, and I could not avoid seeing, looking at it as a matter of substance, that there was a consent given, that it was not against the mother's wish that the marriage should take place, but that it was against the mother's wish that the marriage should take place modo et forma, as it in fact did take place in June, and, further, that she was determined unless a settlement was made, and in the form she required, that the marriage should not take place. In substance, therefore, so far as the marriage itself was concerned, it was in accordance with the consent and the wish of the mother that it should take place, and I think that in construing a clause of this description it would be too harsh to say the marriage having taken place in accordance with a wish that a marriage should take place, that the fact of its taking place at a time not long anterior to that which had been stipulated for should impose the forfeiture on the parties.

Now, with reference to the question of the settlement, I am far from saying that it is not part of the duty of a parent to see that a proper settlement is made; how far I am at liberty to go into this question about the reasonableness or unreasonableness I am not quite sure, but as the point has been gone into, and has been gone into by both parties, I think, for the sake of shewing that this was not a capricious thing, I should say that the conclusion I have come to is this—that so far as the settlement part of the matter is concerned, the reasonableness, when the ultimate offer came on the day before the marriage, lay on the side of the daughter rather than of the mother. The true objection was at last that the marriage took place before the expiration of six months from the death of the young lady's father. I have nothing to do with the question of whether it would not have been in better taste for them to have waited the stipulated time; I have simply to deal with the legal position. I am bound to say this, having made that observa-

tion, that it does appear upon the evidence that the unfortunate strained relationship between the parties had preyed upon the health of the daughter, and there was some reason for hastening the marriage and putting an end to that strain.

On the whole, therefore, having regard to the principle that I think I can gather from the cases which have been cited before me, I think that no forfeiture has operated under this will. As I have said, I, of course, decide it in accordance with legal rights; but I am glad to be able to think that, from the statement of counsel made to me, the husband is prepared to do that which I should have expected any honourable man would have been prepared to do, namely, now to make a settlement substantially in accordance with that which was offered in the letter written by his solicitors on the day before the marriage.

[The plaintiff's costs were eventually directed to be paid out of the testator's personal estate.]

Solicitors: *Morley, Shirreff & Co.; Godden, Son & Holme; Watkin-Williams & Gray; Lyne & Holman.*

W. C. D.

FARWELL J.

1903

Nov. 6.

In re JOHNSTON. MILLS *v.* JOHNSTON.

[1891 J. 1009.]

Practice—Costs—Assessment of Lump Sum in lieu of Taxation—No Objections carried in—Summons to review—Duty of Taxing Officer—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-rr.* 38*a*, 39–41.

The discretion given to taxing officers by sub-rule 38a of rule 27 of Order LXV., to assess a lump sum for costs in lieu of taxation, is a very delicate one, to be exercised judicially and only when special circumstances justify that course, and then only on evidence. And if a taxing officer proceeds under the sub-rule, it is his duty to state in his certificate that he has assessed under the sub-rule, and to give his reasons for doing so.

A taxing officer stated in his certificate that he had taxed a bill of costs at a certain figure, but he had in fact proceeded under the sub-rule and had assessed a lump sum for costs in lieu of taxation. On summons to review without carrying in objections:—

Held, that the taxing officer had proceeded on a wrong principle, and that the bill of costs must go back for taxation.

ADJOURNED SUMMONS.

This action was commenced in 1891 to administer the estate of J. Johnston, deceased, and the trusts of his will. In 1900 a petition was presented to obtain the sanction of the Court to a compromise of certain questions arising on the will of the testator, and to deal with the funds in court. The petition was very lengthy, and the parties interested and their incumbrancers were numerous. The Eagle Insurance Company were mortgagees of an annuity charged upon the testator's residuary estate, and they had obtained a stop order on the funds in court. The charge of the insurance company was mentioned in the petition, but they were not made parties to it, nor were they served with notice of it. On August 9, 1900, an order was made on the petition sanctioning the compromise and referring the matter to chambers for the master to certify that all necessary parties were before the Court, and consented, and the costs of all parties and of incumbrancers of and incident to the application were ordered to be taxed and paid out of the

funds in court. In October, 1900, the insurance company were for the first time informed of the petition and order by Mr. Mear, the petitioners' solicitor. They investigated the matter through their solicitors, Messrs. Hammond & Richards, and eventually gave their consent. Messrs. Hammond & Richards then carried in their bill of costs, amounting to 71*l.* 10*s.* 8*d.*, for taxation under the order of August 9, 1900. On August 4, 1903, the taxing master made his certificate, stating that he had "taxed the costs specified in the schedule thereto, directed to be taxed by the said order, at the sums respectively stated in the schedule; which sums, with the fees of taxation specified, amounted to the total sum of 3168*l.* 7*s.* 5*d.*" Of this sum, "the amount of taxed costs and fees" entered in the schedule as payable to Messrs. Hammond & Richards was 21*l.* 4*s.* 2*d.* Thereupon Messrs. Hammond and Richards, without carrying in any objections, took out a summons asking that the taxing master might be ordered to proceed with the taxation of their bill of costs seriatim.

In answer to an inquiry by the judge, the taxing master stated that he had assessed Messrs. Hammond & Richard's bill of costs under sub-rule 38a of rule 27 of Order LXV. (1) His note at the foot of their bill of costs was as follows: "The payments and counsel's fee, which I have marked in red ink, to be allowed, and in addition a sum of 10*l.* 10*s.* to cover the whole bill."

Quin, for the summons. The taxing master proceeded on an entirely wrong principle, and it was unnecessary to carry in

(1) Order LXV., r. 27, sub-r. 38a, provides: "If upon any taxation it shall appear that the costs have been increased by unnecessary delay or by improper, vexatious, prolix or unnecessary proceedings, or by other misconduct or negligence, or that from any other cause the amount of the costs is excessive having regard to the nature of the business transacted or the interests involved or the money or value of the property to which the costs relate, or to the other circumstances of the case, the taxing master shall allow only such an amount of costs as may be reasonable and proper, and may assess the same at a gross sum, and shall (if necessary) apportion the amount among the parties if more than one. The provisions as to the review of taxations shall apply to allowances and certificates under this rule."

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objections: *In re Castle.* (1) He ought to have taxed under sub-rules 39 to 41 of rule 27 of Order LXV. Under the circumstances nothing that has taken place brings the case under sub-rule 38a. There is no evidence that the solicitors behaved improperly, and it would be a great injustice to them to treat their bill as if they had been guilty of misconduct. The petition contained some fifty printed paragraphs. It was very complicated, and there was a mass of affidavits. The solicitors were justified in taking copies of all the evidence, and in investigating the matter thoroughly, and taking counsel's opinion for the protection of their clients. The taxed costs of the petitioners alone amounted to over 800*l.*

Rowlands, for the plaintiffs in the action. It is admitted that the taxing master taxed on a wrong principle unless he proceeded under sub-rule 38a. But he did in fact assess under that sub-rule, and there is no appeal from his discretion unless the applicants can shew that he has wrongly exercised his discretion.

Ward Coldridge, for the petitioners. Sub-rule 38a is divisible. The first part deals with misconduct, and then it goes on to say, "or if from any other cause, &c." Those words do not necessarily mean matters ejusdem generis with the first part of the sub-rule. A bill may be too long without the solicitor being guilty of misconduct, and if the master thinks under the circumstances that it is excessive, then he has jurisdiction to deal with it on that footing under the latter part of the sub-rule, and to assess a lump sum. That is what he did here. He considered the whole bill, and, after taxing certain items, he allowed a lump sum for the rest of the bill, because he thought it excessive. He really assessed under the sub-rule, but he was not bound to say that he had assessed. Objections should have been carried in, and then he would have given his reasons.

FARWELL J. This is an application of a somewhat unusual nature to review the taxing master's certificate without having first carried in objections. Of course that could not be done if the taxing master has in fact taxed in accordance with the

(1) (1887) 36 Ch. D. 194.

rules. The circumstances are these: A petition was presented in an administration action to deal with the funds in court, and to obtain the sanction of the Court on behalf of infants to a certain family arrangement dealing with a business which belonged to the estate. Amongst other things, the petition asked to deal with a sum of 7000*l.* India 3 per cent. stock, part of the testator's estate. One of the interests under the testator's will was an annuity given to his widow and charged on his estate, including that India stock. The widow had mortgaged her annuity to the Eagle Insurance Company, and no order could be properly made dealing with that India stock without the assent of her mortgagees. The Eagle Insurance Company were not made parties to the petition, but their charge was mentioned in it, and, after Stirling J. had sanctioned on behalf of the infants the general arrangement, an inquiry was directed as to incumbrances, and under it the Eagle Insurance Company were directed to have notice of the proceedings. That was done, and they not unnaturally required to be advised by their solicitors. The petition was very long and complicated, and there was a great deal of evidence in support of it. I do not see how the solicitors of these mortgagees could discharge their duty to their clients without seeing that the allegations in the petition were verified by the evidence. I cannot see that they were wrong in any way in taking the advice of counsel on the matter. It was a case of considerable complication and difficulty, and their clients were being asked to part with a considerable portion of their security; and they were justified in taking all the steps they did for the security of their clients. When their bill came before the taxing master, instead of taxing it item by item, he began to tax it; then left off, and made a note at the end of it in these words: "The payments and counsel's fee which I have marked in red ink to be allowed, and in addition a sum of 10*l.* 10*s.* to cover the whole bill." Now what jurisdiction has the taxing master to treat a bill in that way? The taxing master's duty is to tax. He states in his certificate that he has taxed; but on the face of his own initialed statement in his own handwriting he has not taxed.

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The rule for carrying in objections to taxation applies only to a case where there has been a taxation. If the taxing master has not taxed at all, the rule does not apply, and the matter then comes before the Court on an application properly made to send it back to the taxing master to perform the duty he has failed to perform of taxing the bill. It is very properly admitted here by counsel for the respondents that, unless they can make out that the taxing master has proceeded under sub-rule 38a of rule 27 of Order LXV., he has not taxed at all. I think it is quite plain that he has not taxed. But then it is said he has proceeded under that sub-rule. This is a question to my mind of very great importance to solicitors generally, and also to the public. The sub-rule says that if upon any taxation it shall appear that the costs "have been increased by unnecessary delay or by improper, vexatious, prolix or unnecessary proceedings, or by other misconduct or negligence"—now down to that point it is quite clear that all the matters mentioned are matters of the most vital import to a solicitor, imputing to him misconduct which no honourable man would put up with if he could avoid it—"or that from any other cause the amount of the costs is excessive having regard to the nature of the business transacted or the interests involved or the money or value of property to which the costs relate, or to the other circumstances of the case, the taxing master shall allow only such an amount of costs as may be reasonable and proper, and may assess the same at a gross sum, and shall (if necessary) apportion the amount among the parties if more than one." Now, in the first place, in my opinion assessment and taxation are two different things. We are perfectly familiar with it in the Chancery chambers. In many cases the Chancery master assesses the costs instead of sending the matter to taxation at all. He does not tax; he assesses. If it goes to the taxing master, he taxes unless, under this particular sub-rule, he assesses in lieu of taxation. If he does so assess, in my opinion it is his duty to say so in his certificate; otherwise it is impossible for the Court, in the contest which always takes place as to what has happened before the officials

in chambers, to ascertain whether he has or has not assessed. In this case he has certified that he has taxed, not assessed. Moreover, in my opinion, a taxing master ought not to assess under this sub-rule without some grave reasons for so doing, and without stating in his certificate what those reasons are. It is to my mind somewhat shocking to think that it may be said to a solicitor, "The taxing master assessed your costs instead of taxing them, and therefore he found you guilty of misconduct or negligence"; and there would be nothing on the face of it to shew that he did not, because under that sub-rule the taxing master, according to the argument I have heard, need say nothing about it. He may simply do it of his own will without saying what the circumstances are—what the reasons are—which induced him to act in this way, and may inflict upon a solicitor the imputation of having been guilty of professional misconduct without giving him an opportunity of knowing what the imputation is, or of answering it, if made. In my opinion, if the taxing master intends to proceed under this sub-rule, it is his duty to say so. Moreover—it is not necessary for me in this case so to say—but I do not consider that the words "other circumstances of the case" mean that the taxing master may, if he thinks fit, without giving any reasons at all, but simply because he thinks there are circumstances—there are circumstances in every case—assess instead of taxing: otherwise, he might think a bill was long, and it might induce him to say, "I shall not tax all this. I shall assess a sum instead." I think the sub-rule confers a very delicate discretion, to be used judicially and only when special circumstances justify the master, and then only on evidence, because I do not think a man ought to be convicted of professional misconduct or to be deprived of his contractual rights against his client without evidence. The result in this case is that although the taxing master, according to the face of his certificate, has taxed, it is quite clear from his note and from what he told me when I saw him that he has not taxed. He has assessed, but he has not said so in his certificate. He has, therefore, not proceeded properly under sub-rule 38a, and there has been no taxation. Then it is said that

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I ought not to interfere because the taxing master may have done it according to the other circumstances of the case. I do not consider this really arises; but if it did, I am wholly unable to find any reason whatever for the suggestion. These are mortgagees, and they are entitled to protect their security; and, when I look at the bills of the other solicitors, although it is startling to see the amount obtained by them (the total is 3168*l.*), this particular firm are allowed only 21*l.* 4*s.* 2*d.* Even reading 71*l.* instead of 21*l.*, there is no case of unreasonable amount on the face of it. Assuming, as I am bound to assume, that the taxed costs of all the other solicitors are reasonable and proper, it seems to me that 71*l.* is not necessarily extravagant, as suggested by the respondents. In my opinion this bill must go back to the taxing master for taxation.

Solicitors: *Hammond & Richards; H. Mear; Sole, Turner & Knight.*

H. L. F.

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Nov. 20, 21, 25.

In re SMITH.
EASTICK *v.* SMITH.

[1903 S. 2465.]

Will—Construction—Power given to "my said Trustees"—Power whether Personal or annexed to the Office.

A testator appointed his wife M., his brother C., and his friend R. executors and trustees of his will, and gave to "my said trustees" all his estate upon trust for his wife for life, "with full power to my said trustees" to sell the whole or any part of his estate and apply the proceeds for the benefit of his wife during her life:—

Held, that the power was not personal to the trustees originally named, but was annexed to the office and could be exercised by the trustees or trustee for the time being.

The general principle laid down by the Master of the Rolls (Sir W. Grant) in *Cole* v. *Wade*, (1807) 16 Ves. 27, 44; 10 R. R. 129, 135, that "wherever a power is of a kind, that indicates a personal confidence, it must primâ facie, be understood to be confined to the individual, to whom it is given; and will not except by express words pass to others, to whom by legal transmission the same character may happen to belong," dissented from as being inconsistent with the principle of the decision of the Court of Appeal in *Crawford* v. *Forshaw*, [1891] 2 Ch. 261.

ADJOURNED SUMMONS.

Job Smith by his will dated December 15, 1894, appointed "my dear wife Mary Ann Smith, my brother Charles Smith, and my friend Robert Bell" executors and trustees thereof, and gave and bequeathed "unto my said trustees" all his real and personal estate upon trust, after payment thereout of his just debts, funeral and testamentary expenses, to permit his wife to receive the rents and income thereof, she keeping his dwelling-houses in repair and insured against fire, and "with full power for my said trustees to sell the whole or any part of my said real and personal estate as they in their absolute discretion may think fit, and apply the proceeds arising therefrom for the sole and absolute use and benefit of my said wife for and during the term of her natural life, and immediately upon the decease of my said wife I direct the survivor of them my said trustees to sell and convert into money my said real and personal estate, or such part thereof as may then remain undisposed of," and to

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hold the proceeds upon trusts, under which (in the event which had happened) a Mrs. Hall was now absolutely entitled.

The testator died in 1895, Charles Smith died in 1900, and Robert Bell died in 1902; and by deed dated July 26, 1893, the widow appointed the plaintiffs Eastick and Relf trustees of the testator's will in the place of the two deceased trustees.

The testator's estate was small, and the income was insufficient for the maintenance of his widow, and the question arose whether the widow alone, as the survivor of the three trustees named in the will, or the plaintiffs and the widow together, could sell the real and personal estate; and whether on any such sale the widow alone, or the plaintiffs and the widow together, could apply the proceeds for the benefit of the widow during her life. This summons was taken out to determine the question.

J. G. Wood, for the plaintiffs.

Jenkins, *K.C.*, and *W. M. Humphry*, for Mrs. Hall. The power has lapsed and cannot now be exercised. It is given to personæ designatæ, whom the testator knew and in whom he had personal confidence, and does not pass to the new trustees: *Cole* v. *Wade*. (1) It is not given to the trustees and the survivors or survivor of them, but to "my said trustees"; and the widow cannot exercise the power alone for her own benefit.

Upjohn, *K.C.*, and *Owen Thompson*, for the widow. The contention of the other side would entirely destroy the whole intention and scope of the will. The testator's evident desire was to provide for his wife out of capital if the income was insufficient. Why is the wife to be deprived of the benefit of that provision if she is the survivor of the trustees? It is submitted that the power can be exercised by the widow alone, or, better still, by the trustees or trustee for the time being: *Byam* v. *Byam* (2); *Brassey* v. *Chalmers* (3); *Crawford* v. *Forshaw* (4); 1 Co. Litt. 113 a (note 2); s. 22 of the Trustee Act, 1893. In *Gude* v. *Worthington* (5), which is not unlike

(1) 16 Ves. 27; 10 R. R. 129.
(2) (1854) 19 Beav. 58.
(3) (1853) 4 D. M. & G. 528.
(4) [1891] 2 Ch. 261.
(5) (1849) 3 De G. & Sm. 389.

the present case, the wife was held entitled to the whole fund. *Cole* v. *Wade* (1) is not in point. It was really decided on the words of the particular will.

Jenkins, K.C., in reply.

Cur. adv. vult.

Nov. 25. FARWELL J. This is a question of construction to be determined on the words of this will, but I must of course be guided by general principles of law and the reasoning in other decided cases on similar lines. The testator begins by appointing his wife Mary, his brother Charles, and his friend Robert Bell executors and trustees, and devises and bequeaths all his real and personal estate to "my said trustees" on trust to pay the income to the widow for life, "with full power for my said trustees to sell the whole or any part of my said real and personal estate as they in their absolute discretion may think fit, and apply the proceeds arising therefrom for the sole and absolute use and benefit of my said wife for and during the term of her natural life"; and upon the death of his wife he directs "the survivor of them my said trustees" to sell his real and personal estate, or such part thereof as may then remain undisposed of, and divide the net proceeds between his said brother Charles and his adopted daughter Rosa, with certain executory limitations over. The brother Charles and the friend Robert Bell are both dead, and the widow has appointed new trustees, and the question now arises whether the present trustees can exercise the power above quoted of applying capital for the benefit of the widow, and this depends on the question whether the power is given to the individuals or annexed to the office.

Now the power is undoubtedly one requiring the exercise of great discretion, involving as it does the transference of capital from the beneficiaries named by the testator to the widow, and it is no doubt worthy of observation that the donees of the power include the widow who will profit and one of the beneficiaries who will suffer by its exercise, and that all are described by the relation in which they stood to the testator—

(1) 16 Ves. 27; 10 R. R. 129.

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my wife, brother, and friend. On the other hand, the devise is to "my said trustees," and it is clear that this would take effect, although one or two of the trustees predeceased the testator, and the power follows immediately after the devise and is expressed in the same terms. Unless, then, I am justified in inferring from the nature of the power that "my said trustees" in the power means something different from "my said trustees" in the devise, I must hold that the power is annexed to the office and estate of the trustees, and can be exercised by the survivors or survivor or other the trustees or trustee for the time being; and after considerable hesitation I have come to the conclusion that this is the true view, and that there is not enough to justify me in holding that the power is given to the three individuals, but that, if I so held, I should really be guessing at what I suppose that the testator may have intended rather than construing the words that he has actually used. My hesitation has been mainly caused by a statement in the judgment of the Master of the Rolls (Sir W. Grant) in *Cole* v. *Wade*. (1) He says (2): "I conceive, that, wherever a power is of a kind, that indicates a personal confidence, it must primâ facie, be understood to be confined to the individual, to whom it is given; and will not except by express words pass to others, to whom by legal transmission the same character may happen to belong." The decision in that case turned on the words of the will, which was long and not very lucid; but the Master of the Rolls states a general principle which might be applicable to the present case, if it had been adopted by later cases. The principle, however, is open to the criticism that it is expressed in loose and general terms. All or nearly all powers necessitate the personal confidence of the testator in the donees thereof, and it is very difficult to draw a line: e.g., powers of leasing, of selling and investing, and powers of maintenance and advancement of children, all require the exercise of discretion, but the principle could hardly be applied to them. I find it impossible to formulate any rule by which the Court can say that certain powers are and others are not of such a nature that they must necessarily be given only

(1) 16 Ves. 27; 10 R. R. 129. (2) 16 Ves. 44.

to individuals known to the testator. There is no standard of measurement, but the more and the less become a mere matter of conjecture affording no basis for judicial determination. Further, the Court of Appeal in *Crawford* v. *Forshaw* (1), where *Cole* v. *Wade* (2) was cited, declined by necessary implication, though not in express terms, to adopt the principle. [His Lordship read the head-note in *Crawford* v. *Forshaw* (1), and continued:—] There the testator who conferred the power in that case obviously shewed great personal confidence in his executors therein named, for he allowed them to select the charities which were to be the objects of his bounty; but the Court of Appeal nevertheless held the power to be annexed to the office, and the passage in the judgment of Bowen L.J. is inconsistent with the dictum of the Master of the Rolls in *Cole* v. *Wade*. (2) The Lord Justice says (3): "Even if you find in a will a power given to executors in their official capacity there may be such an indication of reliance on the just judgment of the individuals as would make it impossible, if one or more renounced, for the others to act; but I think that such reliance must be expressed in clear and apt language." In other words, the personal confidence in the individual must be expressed and cannot be inferred from the mere nature of the power. To the same effect is the case of *Byam* v. *Byam* (4), where the power involved the exercise of a very delicate discretion permitting the withdrawal of the trust funds settled by marriage articles and the payment thereof to the wife herself; and this was held to be annexed to the office. It is true that the Court there was dealing with an executory document, and—as pointed out by Wood V.-C. in *Peover* v. *Hassel* (5)—there is a great distinction in the mode of construing executory and executed instruments; but Lord Romilly, although he refers to the fact, does not rest his judgment upon it, and in that case the words "the undersigned trustees," and in *Crawford* v. *Forshaw* (1) the words "my executors herein named," lent much more weight to the argument in favour of personal confidence than

(1) [1891] 2 Ch. 261.
(2) 16 Ves. 27; 10 R. R. 129.
(3) [1891] 2 Ch. 268.
(4) 19 Beav. 58.
(5) (1861) 1 J. & H. 341.

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the words in this will. The result of the authorities and of ss. 22 and 37 of the Trustee Act is in my opinion this: Every power given to trustees which enables them to deal with or affect the trust property is primâ facie given them ex officio as an incident of their office, and passes with the office to the holders or holder thereof for the time being: whether a power is so given ex officio or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the primâ facie presumption, and little regard is now paid to such minute differences as those between "my trustees," "my trustees A. and B.," and "A. and B. my trustees": the testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language. I therefore hold that the power in this will can now be exercised by the present trustees.

Solicitors: *Helder, Roberts & Co.; Gribble, Oddie & Co., for Danby, Palmer & Blake, Great Yarmouth.*

H. L. F.

In re WEST AND HARDY'S CONTRACT.

FARWELL J.

1903

Nov. 27.

[1903 W. 3308.]

Vendor and Purchaser — Mortgage — Married Woman Mortgagee — Joint Account Clause—Transfer of Mortgage—Concurrence of Husband—Separate Acknowledgment.

Since the Married Women's Property Act, 1882, when two or more persons, one of whom is a married woman, advance moneys by way of mortgage, under a recital that the advance is made out of moneys belonging to them on a joint account, it is not necessary on a transfer of the mortgage either for the husband of the married woman to concur in the conveyance or for her to acknowledge it separately under the Fines and Recoveries Act.

In re Brooke and Fremlin's Contract, [1898] 1 Ch. 647, followed.

ADJOURNED SUMMONS.

By deed dated January 23, 1893, and made between James Barton and Louisa Barton (spinster) of the one part, and one West of the other part, James and Louisa Barton, as trustees and in exercise of a trust for sale and in consideration of 2000*l.*, sold and conveyed certain freehold property to West in fee simple; and by another deed dated January 24, 1893, and made between West of the one part and James and Louisa Barton of the other part, West conveyed the same property to James and Louisa Barton by way of mortgage to secure the repayment with interest of the sum of 1250*l.*, then advanced to him by them out of moneys belonging to them on a joint account.

In February, 1893, Louisa Barton married a Mr. Armstrong.

On February 14, 1894, James Barton and Mrs. Armstrong by deed transferred their mortgage of January 24, 1893, to other parties. Mr. Armstrong did not concur in this deed of transfer, nor did Mrs. Armstrong separately acknowledge it.

In July, 1903, West contracted to sell the property to a Mr. Hardy, and, on investigation of the title, an objection was taken on behalf of the purchaser that Mrs. Armstrong was a trustee mortgagee, and that her husband ought to have been a party to and have executed the transfer of mortgage of

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February 14, 1894, and that her execution of it ought to have been acknowledged under the Fines and Recoveries Act. The vendor contended that a good title was shewn, and took out a summons under the Vendor and Purchaser Act, 1874, to determine the question.

Upjohn, K.C., and *Curtis Price*, for the vendor. This is the case of a married woman mortgagee to which the decision of *In re Brooke and Fremlin's Contract* (1) applies. The joint account clause was not notice of a trust. Further, when Mrs. Armstrong was paid off on the transfer of the mortgage she became a bare trustee and could convey as a feme sole under s. 16 of the Trustee Act, 1893: *In re Howgate and Osborn's Contract.* (2)

J. Bradley Dyne, Jun., for the purchaser. *In re Brooke and Fremlin's Contract* (1) is distinguishable. There the married woman was the sole mortgagee, and the money was her separate estate. Here the married woman is one of two mortgagees, and the inference from the two deeds of January 23 and 24, 1893, is that part of the purchase-money was left on mortgage. It was in truth one transaction and a trust mortgage, and the purchaser was put upon inquiry. From the date of the mortgage the two mortgagees were trustees of the land and of the money for their beneficiaries, and it is a case to which *In re Harkness and Allsopp's Contract* (3) applies.

FARWELL J. There is really nothing in this objection of the purchaser. It has been held in *In re Brooke and Fremlin's Contract* (1) that a married woman mortgagee, who is not a trustee, can convey the mortgaged property without the concurrence of her husband or acknowledgment of the deed of conveyance by her under the Fines and Recoveries Act. Now in the present case Mrs. Armstrong and her brother were originally trustees, but that trust came to an end when they sold and conveyed the trust property to Mr. West by the deed of January 23, 1893. The next day the two together took a

(1) [1898] 1 Ch. 647. (2) [1902] 1 Ch. 451.
(3) [1896] 2 Ch. 358.

mortgage of the property from Mr. West, and the mortgage deed contained the usual statement that the 1250*l.* was advanced out of moneys belonging to them on a joint account. It is well settled that the joint account clause, which is a device of conveyancers to keep trusts off a title, is not notice of a trust: *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (1); *Carritt* v. *Real and Personal Advance Co.* (2) It follows that the abstract of title does not shew that Mrs. Armstrong was a trustee mortgagee, and that there was nothing to put the purchaser on inquiry. In my judgment the decision of Kekewich J. in *In re Brooke and Fremlin's Contract* (3) applies to this case, and I shall follow it.

Solicitors: *C. W. & H. B. Taylor; Hind & Robinson.*

H. L. F.

In re GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED.

[1903 G. 0153.]

Company—Sale of Assets—Mortgage Security—No legal Transfer of Security — Dissolution of Company — Vesting Order — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 143—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 26, *sub-s. ii.* (*c*); *s.* 35, *sub-s.* 1, *cl. ii.* (*c*), *and s.* 36.

When a limited liability company goes into voluntary liquidation for the purpose of carrying out a sale of its property and receives the full purchase consideration, and afterwards becomes automatically dissolved by virtue of s. 143 of the Companies Act, 1862, before the property has been legally conveyed to the purchaser, the Court will in a proper case make an order under the Trustee Act, 1893, vesting the property in the purchaser for all the estate of the company therein at the date of its dissolution.

PETITION.

By deed dated April 13, 1899, one McPherson assigned certain premises, known as No. 12, Cable Road, Hoylake, Cheshire, by way of mortgage to the Scottish General Fire

(1) (1883) 24 Ch. D. 720. (2) (1889) 42 Ch. D. 263.
(3) [1898] 1 Ch. 647.

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Insurance Corporation, Limited (hereafter called the corporation), for the unexpired residue of a term of ninety-nine years created by an indenture of lease dated June 19, 1885, to secure the repayment with interest of the sum of 300*l.* then advanced to him by the corporation.

By a written agreement dated May 10, 1900, and made between the General Accident Assurance Corporation, Limited (hereafter called the purchasing company), of the one part and the corporation of the other part, it was agreed that the purchasing company should take over the business, property, and assets of the corporation as a going concern for the consideration and upon the terms therein mentioned. The contract also provided that the corporation should go into voluntary liquidation with the object of carrying the sale into effect; that the purchasing company should take over and pay all the debts, liabilities, and obligations of the corporation; that the corporation or its liquidator should as soon as conveniently might be execute and deliver to the purchasing company all such deeds, transfers, and assurances as should be reasonably required by the purchasing company for vesting in the purchasing company the business, property, and assets agreed to be sold and giving the purchasing company the full benefit of the contract, and that until such vesting was completed the corporation should stand possessed of the same in trust for the purchasing company.

In May, 1900, the corporation went into voluntary liquidation and appointed a liquidator, who in due course received the purchase consideration and made over to the purchasing company all the business, property, and assets of the corporation with all securities, including the mortgage of April 13, 1899. On December 9, 1901, the final accounts and report of the liquidator were passed at a general meeting of the corporation, and on December 13, 1901, the same were filed with the Registrar of Joint Stock Companies, and thereupon, in accordance with s. 143 of the Companies Act, 1862, the corporation became automatically dissolved on March 13, 1902.

By inadvertence no deed transferring the mortgage of April 13, 1899, to the purchasing company was ever executed;

but since December 13, 1901, they had received the interest due under mortgage direct from McPherson, the mortgagor.

The purchasing company, being desirous of getting in the legal estate of the mortgage, applied to the Crown inquiring whether the Crown would execute an assignment of the outstanding legal estate as "bona vacantia," but were informed that the Crown was not able to admit that the legal estate in question was in the Crown. The purchasing company now presented this petition under the Trustee Act, 1893, asking that an order might be made under ss. 26 and 35 of the Act vesting in them the mortgage debt and premises comprised in the deed of April 13, 1899, for all the estate of the corporation therein.

G. Cave, for the petition. When the consideration for the sale was fully paid, the corporation became a trustee of this mortgage security for the purchasing company, and, the corporation having become dissolved, it is submitted it is a case where the "trustee cannot be found" within the meaning of sub-s. ii. (*c*) of ss. 26 and 35 of the Trustee Act, 1893; and under s. 36 of the Act any party interested in a mortgage can apply for a vesting order.

T. B. Napier, for the mortgagor, supported the application.

FARWELL J. I think the case falls within the purview of the sections, and I will make an order vesting in the petitioners the right to sue for and recover the mortgage debt, and also vesting in them the leasehold premises comprised in the mortgage of April 13, 1899, for such estate and interest as was vested in the corporation at the date of its dissolution.

Solicitors: *Smiles & Co., for H. G. C. Day, Liverpool.*

H. L. F.

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In re CALVERLEY'S SETTLED ESTATES.

[1903 C. 2347.]

Settled Land—Capital Money—Additions and Alterations with a view to letting—House in Occupation of Tenant—"Reconstruction, Enlargement, or Improvement"—"Dwellings available for Working Classes"—Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *s.* 25, *sub-ss. x., xx.*; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s. ii.—Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *s.* 74, *sub-s.* 1 (*b*).

Where trustees have approved a scheme of improvements, before they have capital moneys in hand available for carrying it out, subject to the opinion of the Court being obtained on the legal question whether the proposed improvements are within the Act, the Court will decide the legal question though it would not make a prospective order approving the scheme.

Where a tenant, in occupation of a house, has given notice to quit unless certain additions are made, and it would be difficult or impossible to relet the house without making the additions, they may be paid for out of capital as necessary or proper to enable the house to be let within s. 13, sub-s. ii., of the Settled Land Act, 1890.

The proviso in s. 74, sub-s. 1 (*b*), of the Housing of the Working Classes Act, 1890, which limits the operation of that section to "dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate," applies only where new buildings are to be erected. Alterations and additions to existing buildings may be within the Act, although the Court has never expressed an opinion that their building was not injurious to the estate.

Dwellings of a kind suitable for the working classes, but occupied at the time by persons who are not members of those classes, are not available for the working classes within the meaning of the Housing of the Working Classes Act, 1890, s. 74, sub-s. 1 (*b*).

UNDER the will of Edmund Calverley, deceased, the Oulton estate, in the county of York, stood at the date of this application limited to uses under which Horace Walter Calverley, the applicant, was tenant for life in possession, and Edmund Leveson Calverley and his eldest son, an infant of the age of eight and a half years, were tenants for life in remainder.

The applicant had submitted to the trustees of the will, who were also trustees for the purposes of the Settled Land Acts, a scheme for improvements which he desired to have paid for out of capital moneys belonging to the settled estate. The

trustees approved some of the proposed improvements, and as to the rest of the scheme stated that they approved it so far as being for the benefit of the estate, and justifiable as regards expenditure, but that their approval was subject to the decision of the Court being obtained by the tenant for life on the question whether or not the works proposed were as a matter of law improvements within the meaning of the Settled Land Acts.

The applicant then took out this summons, asking that it might be determined that the works mentioned in the scheme were improvements within the meaning of the Settled Land Acts. The trustees and tenants for life in remainder were made defendants.

The works proposed by the scheme were numerous, but the only improvements as to which there was any decision needing a report were the following :—

1. The erection of a washhouse and privy for Prospect House, Rothwell, in the occupation of Dr. Joseph Buck at a rental of 35*l.*, in accordance with plan. The estimated cost is 25*l.*

Dr. Buck occupied this house on a yearly tenancy. It had been let to him by a former tenant for life with a promise that these improvements should be made. Dr. Buck had entered into possession on the understanding that they would be made, and had pressed for them, but had not given notice to quit if they were not made. There was evidence that if the house fell vacant it could not be relet without the proposed additions. The existing sanitary appliances had been verbally condemned by the inspector of the local authority.

2. The construction of closets, ash-pits, and coal places to cottages situate at several named villages or hamlets upon the estate to meet the requirements of the local district councils.

The cottages were numerous, and though the proposed expenditure was small in each case, the total was 925*l.*

The evidence shewed that the estate comprised in all about 2600 acres, consisting in part of agricultural land and in part of house property. There were several collieries and a stone quarry upon the property. The cottages in question were

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occupied for the most part by labourers, farm servants, and artizans employed upon the settled estate, or by colliers employed in the collieries in the neighbourhood, including those on the estate, or masons employed at the quarry; but some of the cottages proposed to be improved were occupied by small tradesmen and others not coming within the definition of the working classes contained in s. 18 of the Settled Land Act, 1890.

The trustees had in their hands only a very small amount of capital moneys, not nearly enough to pay for the proposed improvements, but it was stated in the affidavit of the tenant for life that he contemplated sales which would provide sufficient moneys.

Austen-Cartmell, for the summons.

Wace, for tenants for life in remainder. The trustees have not got capital moneys in their hands for these improvements, and though trustees may approve a scheme before they have money in hand—*In re Duke of Norfolk's Parliamentary Estates* (1)—the Court will not make a prospective order: *In re Millard's Settled Estates.* (2)

Austen-Cartmell. The Court is not asked to exercise its discretion and approve the scheme, but merely to say whether the proposed works are within the Act, leaving the trustees to approve the details.

FARWELL J. I think I may answer the legal question.

Austen-Cartmell. (1.) The additions to Prospect House are within s. 13, sub-s. ii., of the Settled Land Act, 1890. (3) It cannot be necessary that the buildings should be unlet at the time if it is clear that they will be left without a tenant if the additions are not made.

(2.) The proposed sanitary additions to cottages come within

(1) [1900] 1 Ch. 461.
(2) [1893] 3 Ch. 116.
(3) Settled Land Act, 1890, s. 13: "Improvements authorized by the Act of 1882 shall include the following:—

"(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let."

s. 25, sub-ss. x., xx., of the Act of 1882 (1) as extended by the Housing of the Working Classes Act, 1890, s. 74, sub-s. 1. (2) All the houses to which it is proposed to make these sanitary additions are available as dwellings for the working classes, though some of them are for the time being let to persons not coming within the definition contained in the Settled Land Act of 1890. If that is not so, we rely for this class on s. 13 of the Act of 1890, as the improvements are necessary to enable the cottages to be let.

The distinction between improvements which have been allowed and which have been disallowed is sometimes very thin; but it appears that where the proposed improvements are for the personal convenience of the landlord, the Act is very strictly construed; where they are for the purpose of upholding the estate as a place where dependants and others reside, the Court has been more liberal.

Wace, for the tenants for life in remainder. As to Prospect House, it has been held that s. 13, sub-s. ii., of the Act of 1890 applies only where there is a present intention of letting. It cannot apply where the house is already let. The Act contemplates something substantial. The proposed improvements are so small and unimportant that they are not within the Act. If the making of these additions were enforced compulsorily

(1) Settled Land Act, 1882, s. 25, sub-ss. x., xx.:—

"(x.) Cottages for labourers, farm servants, and artizans employed on the settled land or not."

"(xx.) Reconstruction, enlargement, or improvement of any of those works."

(2) The Housing of the Working Classes Act, 1890, s. 74, sub-s. 1:—

"(1.) The Settled Land Act, 1882, shall be amended as follows:—

"(*b*) The improvements on which capital money may be expended, enumerated in s. 25 of the said Act, and referred to in s. 30 of the said Act, shall, in addition to cottages for labourers, farm servants, and artizans whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate."

The Settled Land Act, 1890, s. 18: "The provisions of s. 11 of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression 'working classes' included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding 100*l.* per annum."

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by the sanitary authorities the tenant for life would have to pay for them.

As to the cottages, the Housing of the Working Classes Act, 1890, only applies to dwellings available for the working classes: available must mean available at the time. Houses which are now occupied by persons belonging to other classes are not so available.

There is another fatal objection. The Housing of the Working Classes Act only authorizes the erection of dwellings, "the building of which in the opinion of the Court is not injurious to the estate"; and s. 25, sub-s. xx., of the Settled Land Act, 1882, only authorizes the improvement of works previously authorized. The result is that the proposed works cannot be allowed unless the Court has first given an opinion that the building of the cottages which it is proposed to improve is not injurious to the estate. This cannot now be done.

Stafford Crossman, for the trustees.

Austen-Cartmell, in reply.

FARWELL J. With regard to the proposed additions to Prospect House two questions are raised. The first is as to the construction of s. 13, sub-s. ii., of the Settled Land Act, 1890. [His Lordship read that sub-section and stated the facts as to Dr. Buck's tenancy, and continued:—] I am only asked to construe the Act for the trustees, not to approve a scheme. The words of the section obviously point to a future tenancy. If the doctor gives notice of his intention to quit the house if these improvements are not made, I think they will clearly be "additions to or alterations in buildings reasonably necessary or proper to enable the same to be let"; and, having regard to the promise made to the doctor and all the circumstances of the present case, I think it will be sufficient if the trustees obtain from him a letter to the effect that he will leave the house if the work is not done.

Then in the next place it was urged that this is so small a matter that the Court will not consider it a proper capital charge. I think that is a misconception. It seems to me

that for the purpose of determining questions of construction like the present the Court ought not to take into account the smallness or greatness of the proposed works, unless they are so trivial as not to affect the question of letting or not letting. In this case I do not think they are so small as not to affect that question. Of course, when the Court is asked to approve a scheme comprising small improvements, the Court has a discretion, just as the trustees have in the present case, whether the improvements are so small that the expense of an application to pay out of capital ought not to be incurred; it is very undesirable to encourage applications for trifling improvements. I have felt the difficulty, especially when sitting in chambers, of protecting estates from the continual attempts of tenants for life to get little improvements, the cost of which they ought to bear themselves, allowed out of capital money.

I will answer the question put to me by saying that if the trustees are satisfied that the tenant will leave if the work is not done the proposed improvements are within the Act. It will then rest with the trustees to consider whether the proposed expenditure is really too trivial for their consideration, or of such a nature as may rightly be provided out of capital.

As to the proposed improvements to cottages, I think that cottages now occupied by persons who are not within the statutory definition of the working classes are not available for dwellings for such classes within the meaning of the Acts.

Then that leaves for my consideration the class of houses not so occupied, and the question is one of considerable difficulty. I must bear in mind the scope of the Settled Land Act, as stated by the House of Lords in *Lord Henry Bruce* v. *Marquess of Ailesbury* (1), that it is necessary to prevent the decay of agricultural and other interests occasioned by the deterioration of land and buildings in the possession of impecunious life tenants; and the special consideration shewn by the Legislature to the class of working men. [His Lordship read sub-s. x. of s. 25 of the Settled Land Act, 1882.] There is no question about houses occupied by the class of persons mentioned in that sub-section. But a question does arise with

(1) [1892] A. C. 356, 364.

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regard to a number of these cottages which are inhabited by the working classes as defined by s. 18 of the Settled Land Act, 1890. These cottages are not proposed to be erected under the Act, but are already old buildings. It is said that s. 74, sub-s. 1 (*b*), of the Housing of the Working Classes Act, 1890, does not apply to old buildings. [His Lordship read that section.] Now in my view the proper way in which to read s. 25 of the Settled Land Act, 1882, is to insert the words in sub-s. x., so that that sub-section reads: "Cottages for labourers, farm servants, and artizans employed on the settled land or not, and any dwellings available for the working classes the building of which in the opinion of the Court is not injurious to the estate." Having read those words into sub-s. x., I find that sub-s. xx. refers to the reconstruction, enlargement, or improvement of any of those works. If the combined provisions of the two Acts are to be read strictly, the result would seem to be that the expenditure of capital money upon the reconstruction, enlargement, or improvement of dwellings for the working classes is narrowed down so as to apply only to dwellings which have been built with the approval of the Court. It has been argued accordingly that, inasmuch as these particular dwellings were not built under the direction or with the approbation of the Court, sub-s. xx. does not apply to the present case. I have come to the conclusion that I ought not so to limit the construction of the Acts. The wording of the Acts is not happy, but the true meaning seems to me to be that the limitation is to be applied only in a case where new buildings are concerned, and not in a case where it is proposed to reconstruct, enlarge, or improve old buildings. In my opinion I must so construe these provisions, unless I am to strike out sub-s. xx. altogether with regard to dwellings erected without the approbation of the Court. Moreover, the wording of the phrase is, "the building of which in the opinion of the Court is not injurious." The word "is" and not "was" is used, and I am not, therefore, thrown back by the wording of s. 74, sub-s. 1 (*b*), of the later Act to any antecedent building. I think that the proviso about the opinion of the Court only

applies where new buildings are asked for, and that the inquiry whether the building is not injurious to the estate does not apply where improvements only are proposed.

I therefore answer the question that this part of the scheme is within the Act so far as regards cottages now in the occupation of members of the working classes.

Solicitors: *Patersons, Snow, Bloxam & Kinder, for Dibb & Co., Leeds; Pearce & Aldridge, for Greenwood Teale & Marriner, Leeds.*

J. R. B.

In re BAKER. BAKER *v.* BAKER.

[1898 B. 2072.]

Will—Life Interest—Forfeiture on Alienation — Charge — Cancellation of Charge before Property charged becomes payable.

Under the will of his father, Henry Baker was entitled to a life interest in a share of residue. The will contained a proviso that he should not have power to dispose of his interest by way of anticipation, and that in the event of his becoming bankrupt or doing anything whereby his share or some part thereof would become payable to or vested in some other person it should go over to his children.

The testator died in 1896, and an order for the administration of his estate was made in 1899. In 1903 Henry borrowed two sums of money, and signed in favour of the lenders charges upon his interest in his father's estate. Both charges were cancelled and given up to him in July before any order on further consideration had been made in the action or anything had become payable to him in respect of his life estate:—

Held, that a forfeiture had been incurred, and the fact that the mortgagees released the charges before the estate was distributed was immaterial.

ADJOURNED SUMMONS.

This summons was taken out by the defendant Henry Baker to determine the question whether by reason of two documents executed by him on February 27 and March 25, 1903, a forfeiture had occurred of his share and interest in the estate of George Baker, deceased.

By his will dated September 28, 1896, George Baker gave

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his residuary estate to trustees upon trust to pay the income thereof to his children as follows: one-fourth to his daughter Rosetta for life; one-fourth to his son Walter Samuel for life; one-fourth to his son Arthur William, his executors, administrators, and assigns absolutely; and the remaining one-fourth to his son Henry during his life. The will contained the following proviso: "Provided always and I hereby declare that neither my daughter or my son Walter or Henry shall have power to dispose of their share or any part thereof by way of anticipation, and in the event of either of my said two sons becoming bankrupt or doing anything whereby their said share or some part thereof would become payable to or vested in some other person (which of the said events shall first happen), then I direct that the share of such son shall be payable to his children during his life."

The testator died on November 2, 1896.

In 1898 the present action was commenced to administer the testator's estate, and on May 1, 1899, an order was made for administration.

On February 27, 1903, Henry borrowed 4*l.* 10*s.*, and signed a charge in favour of the lenders as follows:—

"Gentlemen,—In consideration of your advancing to me this day the sum of 4*l.* 10*s.* (four pounds ten shillings), I hereby charge all my interest in the estate of my late father George Baker with the repayment to you of the said sum with interest thereon until repayment at the rate of five pounds per cent. per annum."

On March 25, 1903, he borrowed a further sum of 15*l.*, and signed another charge as follows:—

"In consideration of your advancing to me this day the sum of 15*l.* (fifteen pounds sterling), I hereby charge all my share, estate, and interest in the estate of my late father George Baker with repayment to you of the sum of twenty pounds on the 24th day of September, 1903, and with interest after the rate of five pounds per cent. per annum on the sum of twenty pounds after the 24th day of September, 1903, until the date of repayment."

At this time neither Henry Baker nor the lenders remem-

bered the forfeiture clause. Their attention was shortly afterwards called to it, and on July 24 the charges were given up and cancelled.

The summons now came on to be heard with the further consideration of the action.

A. H. Jessel, for Henry Baker. There has not been a forfeiture. The doctrine of restraint on anticipation does not apply to men, and, even if it did, there is in this will no gift over if Henry Baker anticipates his share; the gift over refers to the latter part of the clause. Nothing has been done whereby any part of his share "would become payable to or vested in some other person." Nothing is payable till the order is made on further consideration, which is now before the Court. The word "would" does not mean "may," but "will": *Ex parte Dawes*. (1) An act which does not necessarily lead to the share becoming payable to some other person cannot work a forfeiture. In this case the charges did not necessarily result in any part of the share becoming vested in or payable to the lenders; nothing is payable before the order on further consideration is made, and the charges were got rid of before anything became payable. Therefore, the Court will treat them as nullities.

[BUCKLEY J. He did an act by which he received money in anticipation of and gave other persons rights over his share.]

The charges were cancelled in time, and the lenders obtained no rights. No part of the share was necessarily payable to them; it depended on certain events. The object of the testator was to secure to Henry the personal enjoyment of the income, and the Court will endeavour to carry out his wishes and take a lenient view of the case if the circumstances which might have caused a forfeiture have been got rid of before anything became payable: *In re Loftus-Otway* (2); *Metcalfe* v. *Metcalfe* (3); Theobald on Wills, 5th ed. p. 555. In *Hurst* v. *Hurst* (4), which will be cited against us, the language of the clause was different.

(1) (1886) 17 Q. B. D. 275, 282.
(2) [1895] 2 Ch. 235, 243.
(3) [1891] 3 Ch. 1, 4.
(4) (1882) 21 Ch. D. 278.

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F. O. Robinson and *Wrangham*, for the children of Henry Baker. There has been a forfeiture, and the gift over takes effect. These charges are within the words "dispose of by way of anticipation": *Seymour* v. *Lucas*. (1)

[He was stopped by the Court.]

Nield, for other parties.

A. H. Jessel, in reply.

BUCKLEY J. Henry Baker was entitled to a life interest, subject to a forfeiture clause which I have to construe. Now, of course, a man cannot be restrained from anticipation, and it is true that the gift over is not so expressed as to include in so many words the event of his anticipating his share. But the words "dispose of their share or any part thereof by way of anticipation" have a bearing on the true construction of the clause taken as a whole. [His Lordship stated the facts, and continued:—]

Henry Baker thus received in anticipation of the distribution of the estate a sum which he charged upon his share. That was done, unfortunately, in forgetfulness of the forfeiture clause by both the debtor and the creditors. Then they found it out, and it is not surprising that they at once cancelled the charges. The question is whether a forfeiture was thereby incurred. In my opinion, it was. At the moment when, upon February 27 and March 25, he executed these charges he gave to the mortgagees a right to receive in payment part of his share. Mr. Jessel has been driven to argue this case as if to cause a forfeiture there must be an act done whereby part of the share is in the events which happen paid to some other person. If that were so, then even if Henry had assigned his share absolutely it would not have caused a forfeiture, because the purchaser might have reassigned it to him before the distribution of the estate. That would be an extravagant contention. What I have to ascertain is whether there was a moment of time at which he gave some one a right to receive part of his share. He did give such a right to the mortgagees. That the persons to whom the right was given

(1) (1860) 1 Dr. & Sm. 177.

released it has no bearing upon the question. He did an act whereby some part of his share "would become payable to some other person." That being so, the clause of forfeiture took effect, and the property passes under the gift over. The summons must be dismissed.

Solicitors: *Aird, Hood, Hook & Paterson; Robert J. Clark, Croydon; Edgar Robins & Clark.*

H. C. R.

DIXON *v.* DIXON.

[1903 D. 288.]

Partnership—Dissolution—Receiver and Manager—Interference.

Where a partnership is dissolved by the Court, and a receiver and manager is appointed with a view to the sale of the business as a going concern, any deliberate act, whether by a partner, party to the action, or a stranger, calculated to destroy the value of the business, is an interference with the receiver and manager, and may be restrained as such, even though not otherwise illegal.

E.g., tampering with the employees of the business and inducing them to give notice to leave, and to join a rival business, is an act of interference, although no breach of contract is instigated.

MOTION.

The plaintiff and defendant had carried on business in partnership as grocers, merchants, and jam manufacturers at Truro.

The business became financially embarrassed, and on February 12, 1903, the plaintiff issued a writ for dissolution of the partnership.

On February 20, 1903, a receiver and manager was appointed to manage and carry on the business as a going concern.

On April 28, 1903, the plaintiff obtained judgment, declaring that the partnership was dissolved on February 12, 1903, by the issue of the writ, and ordering accounts and inquiries, and a sale of the partnership property and effects.

The receiver and manager having dispensed with the defendant's services, the defendant took an active part in establishing

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and became a salaried manager of a rival business at Truro. This business was carried on by the defendant's wife and sons, the capital being found by the wife and her sisters. Owing to the defendant's liability for the debts of the old firm he had intentionally avoided going into business on his own account, and had therefore not taken any share in the new business.

He had informed some of the old employees that the old business was to be sold, and had invited them to give notice to terminate their employment and to join the new business. They were to delay giving notice till the new business was ready for them. Three of the most important employees had in consequence left the old and joined the new business after giving the requisite notice.

The defendant had also approached the landlord of a field that had been in the occupation of the old firm for many years, and was now used by the receiver and manager for running horses at night, with the view of obtaining a tenancy for himself. He required this field for his private use and not for the new firm.

The plaintiff thereupon brought this motion for an injunction to restrain the defendant from in any way interfering with the receiver's management of the old business.

Eve, K.C., and *Ashton Cross*, for the plaintiff. The old business is being carried on under the direction of the Court with a view to its sale as a going concern. For this purpose it is most important to keep the old staff together. The defendant had no right to entice them away for the benefit of a rival business, neither had he any right to attempt to deprive the receiver and manager of a field actually used by him for the purposes of the old business. These acts amount to interference, and the receiver and manager is entitled to an injunction.

Micklem, K.C., and *T. L. Wilkinson*, for the defendant. The defendant's acts do not amount to interference. The employees gave proper notice to terminate their employment according to his instructions, so that no breach of contract was instigated or committed. Again, the defendant's attempt to

obtain the field for himself was not illegal. As soon as his services were dispensed with by the receiver and manager the defendant was free to trade for himself, or to take employment in a rival business. Of course, he might not solicit the old customers; but otherwise he was in no worse position than any other rival trader, and the receiver and manager had no higher rights against him than against a stranger. The motion should therefore be dismissed.

Eve, K.C., in reply.

SWINFEN EADY J. (after stating the facts). The defendant contends that as the employees gave proper notice to terminate their employment according to his instructions, so that no breach of contract was instigated or committed, there was no interference with the receiver and manager. I am unable to take that view. In my opinion, any deliberate act calculated to destroy property under the management of the Court by means of a receiver and manager is an interference with that receiver and manager, although it may not induce the breaking of any contract. The object of the Court is to prevent any undue interference with the administration of justice, and when any one, whether a partner in a business, a party to the litigation, or a stranger, interferes with an officer of the Court, it is essential for the Court to protect that officer. In my judgment, tampering with employees and inducing them to leave a business that is being carried on under the direction of the Court with the view of taking employment at a business that is being started in opposition is an interference against which the receiver and manager is entitled to protection. There is also a further point. A certain field has been in the occupation of the old firm for many years, and is now used by the receiver and manager for running horses at night. The defendant has attempted to obtain this field, not indeed for the new firm, but for himself, although he knew that it had been in the occupation of the old firm for many years, and was still in the occupation of the receiver and manager. Under the circumstances I am quite satisfied that the defendant is interfering with the receiver and manager in the management of the old

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business, and that the receiver and manager stands in need of protection. The defendant must fully understand that he is not entitled to interfere with the receiver and manager in any shape or form in his management of the old business, and the injunction must go accordingly.

Solicitors: *Sydney T. James, for John Messer Bennetts, Truro; Indermaur & Brown, for Dixon & Dixon, Bristol.*

G. R. A.

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Dec. 4, 7, 8.

DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* DAVID MOSELEY & SONS, LIMITED.

[1903 D. 426.]

Patent—Infringement—Combination—Component Part—Sale—Intention.

Defendants made and sold an article capable of being used (inter alia) as one of the component parts of a patented combination. They did not make or sell the other component parts, nor did they invite purchasers to infringe the patent:—

Held, that the intention with which the article was actually made and sold was immaterial, and the defendants had not infringed the patent.

McCormick v. *Gray*, (1861) 7 H. & N. 25, 39, *Townsend* v. *Haworth*, (1875) 12 Ch. D. 831, n., and *Sykes* v. *Howarth*, (1879) 12 Ch. D. 826, 833, followed.

United Telephone Co. v. *Dale*, (1884) 25 Ch. D. 778, 782, and *Innes* v. *Short*, (1898) 15 Rep. Pat. Cas. 449, 452, distinguished.

WITNESS ACTION.

This was an action to restrain the infringement of two of the plaintiffs' patents.

The plaintiffs were the proprietors of the Welch patent 14,563 of 1890 for "improvements in rubber tyres and metal rims or felloes of wheels for cycles and other light vehicles," and of the Bartlett patent 16,783 of 1890 for "improvements in tyres or rims for cycles and other vehicles."

The patents were combination patents, the Welch patent being claimed as "4. A rubber or elastic tyre having the form of a saddle or arch in section lined with canvas in combination with two wires or sufficiently inelastic cores for securing the

same to the rims or tyres substantially as herein described"; and "9. A rubber or elastic tyre having the form of a saddle or arch in section provided with endless wires or cores fitted or vulcanized within each side for the purpose of securing the same to the rims in combination with an inflatible inner tyre or tube substantially as described and shewn with reference to figs. 15 and 18 of the drawings"; and "10. A rubber or elastic tyre having the form of a saddle or arch in section, lined with canvas and provided with endless wires or cores for covering, protecting and securing an inflatible inner tube or tyre substantially as herein described"; and the Bartlett patent being claimed as "1. The combination of a grooved rim or metal tyre, and an arched tyre of india-rubber or other flexible material held in the groove by the pressure of an inflated tube within the arch which forces its edges against the sides of the groove substantially as described"; and "2. Tyres or rims for cycles and other vehicles," consisting of "the outer tyre of india-rubber or other elastic material," and "a metal tyre or rim" and "an air-tight tubular chamber," combined and arranged substantially as described and shewn in the drawings.

The defendants David Moseley & Sons, Limited, who were rubber manufacturers and did not supply rims, wires, or inner tubes, did not make or sell either of the above combinations, but they had for many years made and sold loop edge covers with pockets for the insertion of wires, which the plaintiffs alleged could only be used for the Welch combination, and beaded edge covers which the plaintiffs alleged could only be used for the Bartlett combination. The plaintiffs alleged that unlicensed persons, having purchased these covers, obtained rims, wires, and inner tubes elsewhere, fitted them together, and infringed one or other of the patents, and that the defendants Moseley made and sold the covers with that intention.

The defendants Moseley denied that the covers could only be used for the above combinations, and that they made or sold them with the intention that they should be so used, but contended that even if they were to do so it would be no infringement of the plaintiffs' patents.

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The evidence shewed that the covers, which were sold to exporters, licensees, and non-licensees indifferently, could in fact be used for other purposes than the plaintiffs' combinations.

The case against the defendants, the India Rubber and Tyre Repairing Company, failed on the evidence, and calls for no special report.

Moulton, K.C., Thomas Terrell, K.C., J. C. Graham, and *A. J. Walter,* for the plaintiffs. The defendants Moseley make and sell their covers to unlicensed persons knowing that substantially they can only be used for infringing the patents, and intending them to be so used. They are therefore joint tortfeasors with the ultimate infringers, and liable for the infringement.

Cripps, K.C., Eve, K.C., and *O. L. Clare,* for the defendants Moseley. The gist of the Welch patent is stated in certain judgments of Lindley M.R., Lord Macnaghten, and Lord Davey quoted in *Dunlop Pneumatic Tyre Co., Ld.* v. *New Lamb Tyre Co.* (1), and the gist of the Bartlett patent is stated by Lord Watson in *Gormully & Jeffery Manufacturing Co.* v. *North British Rubber Co., Ld.* (2) The patents are simply combination patents, and the sale of a component part is no infringement. The defendants Moseley are entitled to make and sell their covers to any purchaser, without inquiring whether he is an exporter or licensee, and without any responsibility for their subsequent user. They can be lawfully used by any purchaser for repairing the plaintiffs' tyres, or to make other tyres.

Even if, as is not the case here, the covers were sold with the intention that they should be used for infringement, the defendants Moseley would not have infringed. Where an article may be lawfully made and sold, the intention with which it is made and sold is immaterial: *McCormick* v. *Gray* (3); *Townsend* v. *Haworth* (4); *Sykes* v. *Howarth.* (5) Of course, there must be no invitation to infringe: *Innes* v.

(1) (1902) 19 Rep. Pat. Cas. 384, 388.

(2) (1898) 15 Rep. Pat. Cas. 245, 254.

(3) 7 H. & N. 25, 39.

(4) 12 Ch. D. 831, n.; fully reported, 48 L. J. (Ch.) 770, n.

(5) 12 Ch. D. 826, 833.

Short (1); or manufacture of the plaintiffs' tyres under colour of repairs: *Dunlop Pneumatic Tyre Co.* v. *Neal* (2); but that is not the case here.

Hon. E. C. Macnaghten, K.C., and *Mark Romer*, for the other defendants.

Thomas Terrell, K.C., and *J. C. Graham*, in reply. The defendants Moseley have infringed the patents in two ways. In the first place, the covers are new things in themselves, and form subordinate integers of the respective combinations.

[SWINFEN EADY J. They are not claimed as such.]

A general claim for a combination may cover a novel subordinate integer. In *Clark* v. *Adie* (3) the claim was for "the general arrangement, construction, and combination of parts" of a horse-clipper, and Lord Cairns, after laying down the general rule as to the necessity of claiming subordinate integers, went most carefully into the details of the subordinate integer infringed in that case in order to see whether it had any novelty. He evidently considered that if novel, and of sufficient importance to form the pith and marrow of the invention, it might be covered by the general claim. Otherwise the examination of the details was unnecessary. The decision really turned on the absence of novelty. Again, s. 5, sub-s. 5, of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), requiring a specification to end with a distinct statement of the invention claimed is directory only, and non-compliance with it does not invalidate a patent: *Vickers, Sons & Co., Ld.* v. *Siddell* (4) The patentees' rights depend, therefore, on the entire specification, and not merely on the claim.

Secondly, the sale of the covers to unlicensed persons is a partial infringement of the combinations, and the defendants Moseley are joint tortfeasors with the ultimate infringers, and responsible for the entire infringement. They are deriving a profit forbidden by the statutory grant, which gives "the whole profit and advantage" to the patentees: Patents, Designs, and Trade Marks Act, 1883, Sched. I., Form D. The sale of the

(1) 15 Rep. Pat. Cas. 449, 452.
(2) [1899] 1 Ch. 807.
(3) (1877) 2 App. Cas. 315, 321.
(4) (1890) 15 App. Cas. 496.

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component parts of a combination in such a way that they can easily be put together is an infringement: *United Telephone Co.* v. *Dale.* (1)

[SWINFEN EADY J. How does that apply to the sale of one part?]

If all the parts are sold, the fact that they are sold separately or by separate vendors is immaterial.

Again, the sale of a component part with instructions how to make the combination is an infringement: *Innes* v. *Short.* (2)

In this case the covers speak for themselves, and no further instructions are necessary.

[SWINFEN EADY J. In *Innes* v. *Short* (2) the defendant was restrained, not from infringing the patent or selling the component part, but from selling it with an invitation to the purchasers to infringe. What injunction do you ask?]

An injunction to restrain the defendants Moseley from making and selling covers so constructed that they can only substantially be used to infringe the patents.

Such a sale really amounts to an invitation to infringe.

[SWINFEN EADY J. An injunction in that form might embarrass the defendants Moseley in their sales to exporters or licensees.]

The injunction can be framed so as not to interfere with those sales.

SWINFEN EADY J. This is an action to restrain the defendants David Moseley & Sons, Limited, and the India Rubber and Tyre Repairing Company respectively from infringing the Welch and Bartlett patents. It will be convenient to deal with the defendants' cases separately. There is practically no dispute as to the facts with regard to the defendants Moseley. They are making and selling an outer detachable cover, with a lining suitable for the insertion of wires, so that the cover, as sold by them, is adapted for use in the manner described in Welch's specification, but not necessarily for use solely in that manner. They are also making and selling a cover with

(1) 25 Ch. D. 778, 782. (2) 15 Rep. Pat. Cas. 449, 452.

beaded edges, but without pockets for wires, which cover is capable of being used in the manner described in Bartlett's specification, the beads or lugs of the cover engaging in the inturned angle of the rim. They have been doing that for a considerable period, but the actual period is not material. The issue which I have to try is a very short and simple one, namely, infringement or no infringement. Are the defendants Moseley infringers? It appears that a large portion of their trade is an export trade—that is to say, they make and sell covers intended to be exported as covers. They are intended to be sent abroad, and it is not even suggested that the selling of covers for export only, and not intended to be used in this country in either the Welch or Bartlett combination, would be an infringement. The defendants Moseley also make and sell large quantities of these covers to persons, some of whom are now shewn to be licensees of the plaintiffs. There are a considerable number of licensees under the Welch and the Bartlett patents, and it is not suggested that making and selling the covers to those persons would be an infringement. But the case is much pressed with regard to covers not sold for export, or to licensees, but sold in considerable numbers to the public. It is contended that they can only be used in one or other of the patented combinations, and that the sale is an infringement of the patents.

I can add nothing to the construction of these two patents, which have been the subject probably of as much litigation as any patent since the Statute of Monopolies has been in operation. The construction ultimately put upon the Welch patent appears in *Dunlop Pneumatic Tyre Co., Ld.* v. *New Lamb Tyre Co.* (1), where certain judgments of Lindley M.R., Lord Macnaghten, and Lord Davey with regard to this patent are quoted by Lord Kincairney. Lindley M.R. says: "His" (i.e., Welch's) "objects are to procure rubber tyres which will be very easy running, which will reduce vibration, and which will be securely fastened to the metal rims." . . . "The peculiarity of the invention consists in the arrangement of rubber and wires over a convex surface, the rubber tyre being stretched over its

(1) 19 Rep. Pat. Cas. 384, 388.

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convex support and being kept in its place by the wires in the edges of the rubber without any other support or fastening. The wires themselves grip nothing, but they make the rubber between them and everything between that and the metal rim grip that rim very securely." Lord Macnaghten defines the invention as "an application to a wheel of a saddle-shaped tyre held in position by two inextensible wires"; and Lord Davey says: "The pith and marrow of this invention I take to be this—the use of one arched rubber tyre secured on the rim or felloe of the wheel by inextensible rings which form the edge of the cover." Now, it is manifest from those descriptions that the Welch patent is an invention for a particular combination. The Bartlett patent is dealt with by Lord Watson in *Gormully & Jeffery Manufacturing Co.* v. *North British Rubber Co., Ld.* (1) He says: "The leading, and in this question the only, important claim made by the patentee is for 'the combination of a grooved rim or metal tyre and an arched tyre of india-rubber or other flexible material held in the groove by the pressure of an inflated tube within the area (2) which forces its edges against the sides of the groove substantially as described.' That, as I construe it, is a claim for the method shewn in the specification, or for any method substantially the same, of so connecting the ends of the outer cover with the metal rim that the ends of the cover are firmly held or detained, and that part of it which comes in contact with the ground is kept in its proper position as the outer part of the tyre of the wheel. And on a fair consideration of the terms of the specification, taken as a whole, the claim so made appears to me to embody the pith and substance of the invention. I do not think that the patentee claims to have invented the use of a metal rim, an outer cover, or an inner pneumatic tube constructed of cloth and india-rubber, either singly, or as forming in combination the tyre or felloe of a wheel for cycles or other vehicles. In my apprehension, what he does claim as a novel invention is the mode which he has described of making such an attachment between the ends of the cover and the edges of the metal rim as will serve, if I may use the expres-

(1) 15 Rep. Pat. Cas. 245, 254. (2) *Sic.*

sion, to consolidate these three component parts of the tyre, whilst the wheel is in motion, by retaining both the cover and the inner tube in their right positions."

Those constructions of the specifications, which are binding upon me, shew that both are patents for particular combinations. Now, it was settled by the decision of the House of Lords in *Clark* v. *Adie* (1), that if the claim is solely for a combination, there is no infringement unless the entire combination is taken, and, moreover, that in order to protect a subordinate part, it is necessary to claim it even when it is new and material, and that a subordinate part must be new, useful, and patentable per se in order to be protected. It appears that rims suitable for both the tyres in question are, and have for many years past been, openly and publicly made and sold; that inner tubes have been and are still made and sold; and that wires suitable for use in Welch tyres form an ordinary article of commerce: wires with a nut containing a right- and left-handed screw suitable for fastening together the ends of the wire. All these articles have been sold openly for many years, and are not complained of; but it is said that the defendants Moseley infringe by selling the covers. Now, although probably in most cases the covers would ultimately form part of either a Welch or Bartlett combination, I am of opinion that those combinations do not exhaust the purposes to which the covers may be put, and that they would be useful for other purposes in connection with other tyres, as one of the expert witnesses pointed out. But as a matter of law I am of opinion that the defendants Moseley are not themselves infringing either of the patents in question. They only make and sell the outer covers. They are rubber manufacturers. They do not sell the wires and they do not sell the rims—that they have nothing to do with; and by merely making and selling these outer covers they do not infringe either of the patents. It would be difficult, indeed, to see, from a practical point of view, if that were not so, how the defendants Moseley could carry on their business. Selling these covers to licensees of the plaintiffs is a lawful trade; selling them for export is a lawful trade; but the purchasers,

(1) 2 App. Cas. 315, 321.

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nevertheless, might not export them, and to make the defendants Moseley responsible for the ultimate use of the covers, so as to put upon them the burden of ascertaining whether the purchasers intended to use and used them lawfully, would be imposing upon them a burden which, in my opinion, the law does not impose. The defendants Moseley must not, of course, infringe the patents, but the mere manufacture and sale of one of the component parts of the entire combination is not, in my opinion, an infringement; and if that is so with regard to the Welch patent, it is so a fortiori with regard to the Bartlett patent.

The plaintiffs' counsel pressed upon me the dictum of Pearson J. in *United Telephone Co.* v. *Dale* (1), to the effect that a sale of all the component parts of a patent knife that any schoolboy could put together might be an infringement of the patent, and contended that the sale of any one component part is an infringement—that the Welch tyre being a combination of a cover, tube, wire, and rim, the sale of the cover only is an infringement. The decision in *United Telephone Co.* v. *Dale* (1) is certainly no authority for that proposition.

Then my attention was called to *Innes* v. *Short.* (2) In that case an invention for using zinc powder to prevent corrosion in steam boilers was patented. The defendant, having sold zinc powder with printed directions for that use, was restrained, not from infringing the patent or from selling the powder, but merely from selling it with an invitation to the purchasers to infringe the patent. That is far removed from the present case.

Again, the plaintiffs' counsel insisted that the intent with which the defendants Moseley sold these covers was an essential part of the plaintiffs' case, which was that they could only be used for infringement, and, therefore, that the defendants Moseley must be presumed to have the intent to infringe. It is not the fact that they could *only* be used for purposes which would be an infringement. Moreover, in *McCormick* v. *Gray* (3), where there was a question of infringement, Bramwell B. says:

(1) 25 Ch. D. 778, 782. (2) 15 Rep. Pat. Cas. 449, 452.
(3) 7 H. & N. 25, 39.

"I am satisfied that there is no difference between making a thing with one intent and another. If a man may do a thing, he may do it with whatever intent." So that if the defendants may lawfully make and sell these covers, the intent with which they make and sell them is not material.

There are also two cases in which a question has arisen as to whether a sale of one component part of a combination is an infringement of the entire combination to which I will refer. One is the judgment of Jessel M.R. in *Townsend* v. *Haworth* (1), afterwards affirmed by the Court of Appeal. After drawing attention to what a person is prohibited from doing by the terms of the patent, Jessel M.R. says: "He is prohibited from making, using, or vending the prohibited articles, and that, of course, includes in the case of machinery the product, if I may say so, of the machinery which is the subject of the patent. It is that which is produced by the patent. But has any one ever dreamt before this case that that extends to the component articles which enter into the patent? So far from that being the law, it has been decided that in cases of what they call combination patents it is only the combinations claimed that may not be used; the other elementary combinations may be used. No doubt there has been a good deal of litigation as to what were the combination claims, that is, whether in claiming the entire combination you claim the subsidiary combinations or not . . . . But you cannot even complain of the use of subsidiary combinations unless they are within the purview of your claim." His observations are strengthened by a previous passage, where he says that: "No judge has ever said that the vendor of an ordinary ingredient does a wrong if the purchaser coming to him says, 'I want your compound, because I want to preserve my cloth from mildew. I wish to try the question with the patentee.' No one would doubt that that sale would be perfectly legal." "You cannot make out the proposition that any person selling any article, either organic or inorganic, either produced by nature or produced by art, which could in any way be used in the making of a patented article can be

(1) 12 Ch. D. 831, n.; fully reported, 48 L. J. (Ch.) 770, n.

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sued as an infringer, because he knows that the purchaser intends to make use of it for that purpose." The learned judge was there dealing with an article the sale of which might be innocent and which might be used for lawful purposes, but he held that if the purchaser came and said, "I am buying the article for the particular purpose of using it to try the question of the validity of the patent, or for using it for the purpose covered by a patent," the sale would still be legal. The other case is *Sykes* v. *Howarth* (1), in which Fry J. took the same view, and said: "I entirely agree, if I may say so, that selling articles to persons to be used for the purpose of infringing a patent is not an infringement of the patent."

In *Dunlop Pneumatic Tyre Co.* v. *Neal* (2) the point of the decision was that the defendant had gone beyond fair repair, and had made and sold that which was really a new tyre, and precisely the particular combination protected by the patent.

The plaintiffs' counsel pressed me strongly with *Clark* v. *Adie* (3), but when Lord Cairns was considering the details of what he had previously referred to as the "subordinate integer" he was only doing so for the purpose of the case, and not in the least departing from or modifying the principle of law which he had previously laid down as to cases where the subordinate integer is alleged to be infringed and protection for it is claimed. He says: "The invention must be described in that way; it must be made plain to ordinary apprehension upon the ordinary rules of construction, that the patentee has had in his mind, and has intended to claim, protection for those subordinate integers; and moreover he is, as was said by the Lords Justices, at the peril of justifying those subordinate integers as themselves matters which ought properly to form the subject of a patent of invention."

The result is that the defendants Moseley are not infringing either patent, and are doing nothing of which the plaintiffs can complain. [Having held on the evidence that there was

(1) 12 Ch. D. 826, 833. (2) [1899] 1 Ch. 807.
(3) 2 App. Cas. 315, 321.

no case against the India Rubber and Tyre Repairing Company, his Lordship continued :—]

Perhaps, before parting with the case, I ought to add this. The plaintiffs' counsel contended that the covers were new things in themselves claimed as parts of the respective combinations, and separate property. This contention is not well founded, and the difficulty in which the plaintiffs are placed became more manifest when I pressed their counsel as to the form of the injunction which they really wished to obtain. They suggested an injunction to restrain the defendants Moseley from making and selling covers so constructed that they could only substantially be used to infringe the patents. But what about the sale to exporters or licensees? Counsel recognised that there would be a difficulty in taking an injunction in the general form having regard to those persons, and ultimately I was not able to obtain any further assistance as to the form of the injunction asked for. The truth is that any injunction granted would restrain the sale of articles which may lawfully be made and sold, and that what the defendants Moseley are doing is not infringement; and that the defendants, the India Rubber and Tyre Repairing Company, have not themselves in any way infringed. The result is that the action fails, and must be dismissed with costs.

Solicitors: *John B. & F. Purchase; Rowcliffes, Rawle & Co., for F. A. Woodcock, Manchester; Emmet & Co., for A. & G. W. Fox, Manchester.*

G. R. A.

C. A.
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Nov. 5, 6;
Dec. 21.

In re RAYNER.
RAYNER *v.* RAYNER.

[1903 R. 53.]

Will—Construction—Investment Clause—"Securities"—Primary Meaning—Secondary Meaning—Context—Stocks and Shares in Companies—Extrinsic Evidence, Admissibility of.

A general broker, who died in 1896, by his will made in 1895, after bequeathing a trust legacy, declared that "all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit: and I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities":—

Held (reversing the decision of Farwell J.), that the context was sufficient to shew that "securities" meant "investments" and included stocks and shares in railway and other companies.

The admissibility of extrinsic evidence to ascertain the true sense and meaning of doubtful expressions in a will, discussed and considered.

Whether at the present day the word "securities" in a legal document, in the absence of context, includes stocks and shares as well as mortgages on land or other property, *quære*.

Ogle v. *Knipe*, (1869) L. R. 8 Eq. 434, considered.

By his will dated December 11, 1895, Edward William Rayner, who therein described himself as "of the city of Liverpool, in the county of Lancaster, general broker," after appointing executors and trustees, and bequeathing a legacy to his issue by his first marriage, gave to his trustees a sum of 165,000*l.* in trust to pay out of the income thereof a sum of 3500*l.* to his present wife during her life, if she should so long remain his widow, for the maintenance of herself and children, and to accumulate the residue of such income until her decease or marriage again, whichever should first happen, and then to hold the said trust moneys and the accumulations thereof in trust for all his five children by his present wife at twenty-one or marriage, his two daughters by her taking the sum of 30,000*l.* each as their proportion, and his three sons by her taking the sum of 35,000*l.* each as their proportion of the said sum of 165,000*l.*, together with any additional proportionate

share that might accrue by survivorship, and each of his last-mentioned five children taking a like proportion of any interest or accumulation over and above the said sum of 165,000*l*. And the testator directed his trustees to retain the shares of each of his last-mentioned daughters upon trusts for them respectively and their respective children. And the testator gave his residuary real and personal estate to his trustees in trust for sale and conversion (with power of postponement), and to hold the proceeds in trust in certain shares for his two sons and his surviving daughter by his first marriage and the children of a deceased daughter by that marriage, the shares of the surviving daughter and of the children of the deceased daughter to be held upon the trusts therein mentioned. The will then contained the following declaration: "And I declare that all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit: and I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities."

The testator died on May 24, 1896, leaving surviving him his widow, also his two sons by his first marriage, both of whom had attained twenty-one, his surviving daughter by that marriage, who was married, and children of the deceased daughter by that marriage, all of whom were infants; he also left surviving him his five children by his second marriage, namely, three sons, who had all attained twenty-one, and two daughters, both of whom were married and had children. The testator left personal estate to the amount of about 500,000*l*. On October 31, 1896, after the testator's death, his trustees appropriated in part satisfaction of the 165,000*l*. trust legacy ordinary stock of the Midland Railway Company belonging to him at the time of his death.

In January, 1903, this action was commenced by originating summons taken out by the testator's three sons by his second marriage against the executors and trustees of the will, the widow, the testator's children by his first marriage, the two daughters by his second marriage, their children, and the infant children of his deceased daughter by his first marriage, for an

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account of the income of the trust fund bequeathed in favour of his widow and her five children, and of the accumulations thereof; for payment to the plaintiffs of their respective shares of the said accumulations, and of the future income arising from the said trust fund; and also to obtain the opinion of the Court as to a question arising upon the plaintiffs' respective legacies of 35,000*l.* each.

Further questions subsequently arose upon the will, namely, whether the executors and trustees were authorized (1.) to appropriate to the trust legacy of 165,000*l.*, as they had done, out of the investments belonging to the testator at the time of his death, ordinary stock of the Midland Railway Company; and (2.) to purchase (as they proposed to do) with moneys forming part of the same trust legacy ordinary stock of the London and North Western Railway Company. Accordingly a summons asking for the determination of those two questions was taken out by the plaintiffs in the original action (the three sons by the testator's second marriage) against the defendants, the executors and trustees of the will, the residuary legatees, and the two daughters by the second marriage and their children.

At the hearing of the summons before Farwell J., evidence by affidavit was tendered to shew that, at the dates of his will and of his death, the testator had the greater part of his estate invested in shares in companies and other property not coming within the description of "securities" in the sense of charges on property, a list of his investments being given, which included shares, stocks, and debentures to a large amount, not more than 2300*l.* being invested in "securities" in the strict sense of the term. Evidence by a stockbroker and a chartered accountant was also tendered to shew that the stocks, shares and debentures included in the list of the testator's investments were, in and prior to 1895 and 1896, and had ever since been usually (if not invariably) described and spoken of under the general name of "securities" by commercial men, brokers, accountants, and solicitors; and that the word, as used among persons of those classes, included stocks, shares, scrip, and bonds to bearer, and was not confined to mortgages or charges

upon property. The stockbroker also deposed that the word was used in this comprehensive sense according to the regulations of the Liverpool Stock Exchange, where the testator had been carrying on his business.

The question for argument accordingly was whether the word "securities" in the above-quoted declaration in the will should be construed as including stocks and shares in railway and other companies.

Farwell J. decided both the questions of the summons in the negative, his Lordship saying that the word "securities" had the well-defined primary meaning of "money secured on property," and did not extend to a share of property. His Lordship, while admitting that the word had also a secondary meaning, held that he could not, consistently with the authorities, allow himself to have regard to that secondary meaning, but that he was bound to construe the word in its strict and primary sense. He also held that the evidence which had been tendered to shew that the testator had the greater part of his estate invested in shares and other property not coming within the primary meaning of the word "securities" was not admissible, the word having "a sensible construction without departing from the strict meaning of the words" of the will: Wigram on Extrinsic Evidence, 3rd ed. Prop. II. pl. 27, p. 18. His Lordship accordingly made an order rejecting the evidence that had been tendered; also expressing the opinion that the word "securities" in the will did not include "shares in companies," and declaring that under the terms of the will the executors and trustees were not authorized to make either the appropriation or the purchase as asked by the summons.

The defendants, the residuary legatees, appealed from the whole of the order. The defendants, the executors and trustees, also appealed by a cross-notice.

The appeals were heard on November 5 and 6, 1903.

Upon the opening of the first appeal the question at once arose whether the evidence which had been rejected in the Court below should now be admitted. After some little

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discussion their Lordships allowed the affidavits to be read, subject to any objections.

The argument was then proceeded with.

Upjohn, K.C., and *MacConkey*, for the defendants, the residuary legatees, other than the infant children of the testator's deceased daughter by his first marriage. We submit that the word "securities," as used in this will, is sufficient to include stocks or shares in any railway or other company. The word has, besides its strict legal meaning, a well-known secondary meaning, as including all stocks and shares dealt with on the Stock Exchange, and coming under the head of "Marketable Securities." The old legal meaning of the word is now much extended. For instance, as defined in s. 50 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), it includes "stocks, funds, and shares," the Legislature thus using the word in the same sense as this testator appears from the context to have used it; and the "securities" referred to in the Act are described in s. 1 in Part I. under the head of "Investments," some of which are not "securities" in the strict etymological sense of the word. So in the Rules of the Supreme Court, 1883, Order XXII., rr. 15, 16, and 17. As long ago as *Bescoby* v. *Pack* (1) it was held that "securities for money" would pass public stocks, such as Consols, and possibly bank stock.

[ROMER L.J. referred to *Re Beavan* (2), where it was held that Consols and promissory notes were securities for money, and also railway debenture stock, because by statute debenture stock is a charge on the undertaking. It was said in the cases, observed his Lordship, that a share in a railway or other company was not a "security," because it was in reality only a piece of property which might be purchased like any ordinary chattel; but a purchase of Consols was not so regarded, Consols being treated as in the nature of a borrowing on the part of the Government.]

Shares are really "things in action": *Colonial Bank* v. *Whinney*. (3) The test of a "security" is whether your

(1) (1823) 1 S. & S. 500; 24 R. R. 217.

(2) (1885) 53 L. T. 245.

(3) (1886) 11 App. Cas. 426.

interest or property can be taken into the market and converted into money. For instance, a debenture which is redeemable is a "security" by reason of its facility for being turned into money—that is to say, it is a "marketable security." Of "securities" in the modern sense some are "marketable," and others, like mortgages, are not.

The latest case on the subject, and one very near the present, is *Re Johnson* (1), where it was held by Kekewich J. that the words "all securities for money standing invested in my name" included mortgage bonds, India Stock, perpetual debenture stocks in railway companies, and shares in a limited company. No doubt, there are two authorities the other way, but they turn on the context. The first is *Hudleston* v. *Gouldsbury* (2), where it was held that canal shares would not pass under a bequest of property vested in "bonds or other securities." The second is *Harris* v. *Harris* (3), where it was held that a power to invest "upon the security of the funds of any company incorporated by Act of Parliament" did not authorize an investment in railway preference shares. Judges in delivering their judgments use the word "securities" in the modern sense as including investments of all kinds: *Little* v. *London Joint Stock Bank* (4); *In re Chapman.* (5) Again, the secondary meaning of the word "securities"—that is, all securities which are dealt with on the Stock Exchange—is adopted in all modern publications and dictionaries, such as the Encyclopædia Britannica, vol. xxxii. p. 864; Chambers's Encyclopædia (1895); the Imperial, Century, Nuttall's, and Oxford English (Murray's) dictionaries. So in stock and share lists, in brokers' circulars, and in the public press. Thus for years past the word has been treated as including all marketable investments dealt with on the Stock Exchange: Cavanagh's Law of Money Securities, 2nd ed. p. xi.; Brodhurst's Law and Practice of the Stock Exchange, p. 73.

[ROMER L.J. referred to *Ogle* v. *Knipe.* (6)]

That was a decision on a specific bequest, and not upon an

(1) (1903) 89 L. T. 84.
(2) (1847) 10 Beav. 547.
(3) (1861) 29 Beav. 107.
(4) [1891] 1 Ch. 270, 296.
(5) [1896] 2 Ch. 763, 782.
(6) L. R. 8 Eq. 434.

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investment clause: moreover, that case was decided in 1869, more than a generation ago. A definition of what was meant by the word "security" thirty years and more ago should not be accepted as a guide at the present day. The criterion of what is a "security" is the facility of turning property into money through the existence of a market.

[*Butcher, K.C.*, for the plaintiffs. Our contention is that the word "security" has had a primary meaning given to it by Courts of law, and that the legal definition should be followed now.

VAUGHAN WILLIAMS L.J. Fifty years ago the word "electricity" had a primary meaning: Are we to follow that meaning now, notwithstanding that it has been extended by modern scientific discovery?]

The word "investment," which includes all securities, is defined in the Oxford English Dictionary, ed. Murray, as (5 b) "Some species of property from which an income or profit is expected to be derived in the ordinary course of trade or business," as distinguished from speculation; and (5 c) as "a form of property viewed as a vehicle in which money may be invested": *Tucker* v. *Wilson* (1), or *Wilson* v. *Tooker*. (1)

The evidence in this case shews that the testator must have had in his mind, when using the word "securities," investments such as those in which the greater part of his property then stood. The context is, according to our view, clear; but if not, then, according to the established rule, this evidence is admissible for purposes of explanation.

We submit that, both upon the evidence and upon the context, the word "securities" means, and was intended by the testator to mean, not "securities" in the archaic sense, but in the modern sense. *In re Kavanagh* (2) was the case of a purchase of shares in a limited company, which was clearly an improper security.

[VAUGHAN WILLIAMS L.J. To ascertain the meaning of "securities" in a will you must look at the whole will.]

We submit that in this will the word "securities" ought

(1) (1714) 1 P. Wms. 261; 5 Bro. P. C. 193.

(2) (1891) 27 L. R. Ir. 495; (1892) 29 L. R. Ir. 333.

not to be limited to sums of money secured by a collateral charge.

[VAUGHAN WILLIAMS L.J. referred to *Dicks* v. *Lambert.* (1)]

Bramwell Davis, K.C., and *Rotch*, for the defendants, the executors and trustees. Under the definition clause, s. 2, of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), "securities" includes "stocks, funds, and shares"; and so in s. 2 of the Settled Land Act, 1882. In this will the word is synonymous with "investments," that is, investments held by the testator at the time of his death. The word should be construed according to its ordinary acceptation in the transactions of life, and not technically: *Parker* v. *Marchant* (2); *In re Bedson's Trusts* (3); *In re Cadogan.* (4)

Butcher, K.C., and *Christopher James*, for the plaintiffs. We submit that the clause in question should be construed literally as a direction to continue or leave any moneys invested at the testator's death "in or upon the same securities," that is, upon the same "securities" as the testator then held. The expression "securities" or "securities for money" has a clear legal technical meaning settled by authority, namely, "money secured on property," as opposed to property itself; and it requires a strong indication by the testator to shew that it is to have a different meaning. The secondary or popular meaning cannot be given to it unless the primary meaning is inapplicable. The meaning which it is said the word "security" bears at the present day, namely, a marketable investment, or an investment capable of being converted into money, is a meaning quite inapplicable to many things which are admittedly "security." The definition contended for on the other side would include any investments, however speculative, such as shares in unlimited as well as in limited companies, and it would not include what are really securities, namely, moneys secured on property. First, then, we say that the word "securities" or "securities for money" has a primary meaning: Key and Elphinstone's Precedents in Conveyancing,

(1) (1799) 4 Ves. 725.
(2) (1843) 1 Ph. 356, 360; 57 R. R. 327, 342.
(3) (1885) 28 Ch. D. 523, 525; 54 L. J. (Ch.) 644, 646.
(4) (1883) 25 Ch. D. 154.

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7th ed. vol. ii. p. 463; Theobald on Wills, 5th ed. p. 177. With regard to Consols, the National Debt (Conversion) Act, 1888 (51 & 52 Vict. c. 2), s. 2, expressly states that the stock of perpetual annuities shall be a charge on the Consolidated Fund; Consols have always been treated as "securities." In *Trafford* v. *Boehm* (1) it was held that "security" means, not property, but money charged or secured on property. For instance, shares are "property," but they are not "security." That distinction is adopted in *Ogle* v. *Knipe* (2) and other authorities, such as *Hudleston* v. *Gouldsbury* (3) and *Harris* v. *Harris*. (4) *Ogle* v. *Knipe* (2) was the first decision that bank stock and canal shares were not "securities for money." In *Re Beavan* (5) Consols and promissory notes were held to be "securities for money," and so were railway debenture stocks because such stocks are by statute a charge on the undertaking. "Securities," having a definite legal meaning, can only be construed in an extended sense as including shares where it is clear from the context that the testator used it in that extended sense: *M'Donnell* v. *Morrow* (6); *In re Kavanagh* (7); *Turner* v. *Turner*. (8)

With regard to the definitions of the word "securities" in Acts of Parliament, the definition including "shares" was necessary because the intention of the Legislature was to include in the word "securities" things not ordinarily passing under that word. If "securities" did in fact include shares, such a definition clause was not necessary.

In Wigram on Extrinsic Evidence, 3rd ed. Prop. II. p. 17, it is stated to be "an inflexible rule of construction" that in the absence of context "the words of the will shall be interpreted in their strict and primary sense."

The words of the clause in this will are not ambiguous, and therefore do not require explanation by extrinsic evidence. In *In re Grainger* (9) Rigby L.J. stated in his judgment that a will bearing a definite construction cannot have

(1) (1746) 3 Atk. 440, 443.
(2) L. R. 8 Eq. 434.
(3) 10 Beav. 547.
(4) 29 Beav. 107.
(5) 53 L. T. 245.
(6) (1889) 23 L. R. Ir. 591.
(7) 27 L. R. Ir. 495; 29 L. R. Ir. 333.
(8) (1852) 21 L. J. (Ch.) 843.
(9) [1900] 2 Ch. 756, 762.

another and a different construction imposed on it by extrinsic evidence; and that statement was approved by the House of Lords on appeal: *Higgins* v. *Dawson*. (1) The context in this will is really a caution to the trustees against keeping such fluctuating things as shares. There is no apparent intention here to use the word "securities" in other than its primary sense. Our construction gives a rational meaning to every word in the will; there is no context which necessarily enlarges the meaning of the word "securities," and, upon the authority of the last-mentioned cases, extrinsic evidence is not admissible to give it a more extended interpretation, such as evidence tendered here to shew what securities the testator held at the date of his will and what he held at the date of his death: Wigram on Extrinsic Evidence, 3rd ed. Prop. II. p. 18. As to *Re Johnson* (2), we submit that decision is wrong, but it really has no bearing on the present case, as Kekewich J. found that there was a sufficient context. It is open to question whether, in order to assist the construction of the will, the learned judge was right in looking at a non-testamentary document—a list headed "securities."

The cases make no distinction between the expressions investing "in" and "upon" securities. The word "securities" has been held in a long line of cases not to include shares in a company, either in wills or in any other legal documents.

[VAUGHAN WILLIAMS L.J. The word is not a term of art, but only a word of description. It is a commercial word which will vary with the history of commerce.]

But it has always received a definite interpretation in the Courts.

Loraine, for the defendants, the two daughters of the testator by his second marriage, and their children.

F. Thompson, for the defendants, the infant children of the testator's deceased daughter by his first marriage.

Upjohn, K.C., in reply. I submit that the passage in Wigram, 3rd ed. pl. 10, p. 9, referred to by Rigby L.J. in *In re Grainger* (3), and by Lord Davey in *Higgins* v. *Dawson* (4), to

(1) [1902] A. C. 1, 9.
(2) 89 L. T. 84.
(3) [1900] 2 Ch. 763.
(4) [1902] A. C. 10.

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the effect that evidence explanatory of what is insufficiently explained by the will itself is admissible, is in my favour.

[VAUGHAN WILLIAMS L.J. The passage is no authority that you can always bring evidence of a testator's surroundings.]

"Security" is an equivocal word: it is not a technical word at all, but a word of business. All the dictionaries concur in saying that a "security" is evidence of title to property.

The words the Court should regard here are "moneys invested at my death," not the word "securities" exclusively. If so, the authorities apply, and Midland ordinary stock is included in "moneys invested." I ask the Court to read the word "securities" at the end of the clause here as "investments"; for what the testator was evidently thinking of were his investments at his death: in fact, the testator is his own dictionary. He had two things in his mind: (1.) stocks and shares, and (2.) securities in the strict sense of the word.

Trafford v. *Boehm* (1) is distinguishable: there the words were "good" securities, and the question was whether the particular investment came within that description. Sect. 2 of the National Debt (Conversion) Act, 1888, does not assist the argument on the other side, for the Government obligation is not to repay a sum of money, but to pay an annuity. A purchaser of that stock buys a "security" in the wider and not in the limited sense.

In re Kavanagh (2), when examined, certainly did not decide the general question that "securities" should always be construed in the restricted sense.

M'Donnell v. *Morrow* (3) was a case upon a specific bequest, and not upon an investment clause such as we have here.

Harris v. *Harris* (4) was also a different case, for it only decided that a power to invest upon the security of the "funds" of any company did not authorize an investment in "shares." It is erroneous to say that there is a long line of authorities in favour of the restricted sense of the word "securities"; there is no such rule of construction, and I submit that the word

(1) 3 Atk. 440.
(2) 27 L. R. Ir. 495; 29 L. R. Ir. 333.
(3) 23 L. R. Ir. 591.
(4) 29 Beav. 107.

here should be construed in the modern sense. At all events, there is sufficient context here to support that view.

VAUGHAN WILLIAMS L.J. We will consider our judgment.

Cur. adv. vult.

Dec. 21. VAUGHAN WILLIAMS L.J. The question the Court has to decide in this case is, What is the meaning of the word "security" in this will?

In my judgment, in this will the meaning of that word, or rather of the word "securities," is determined, for reasons which I will presently discuss, by the context of the will, and it is unnecessary therefore to discuss generally what is the meaning of the word "security"—either its common and ordinary meaning at the date of the will, or what is the meaning of the words "strict and primary sense" in Proposition II. in Wigram V.-C.'s treatise on Extrinsic Evidence; for it is apparent from the context of this will that the testator has not used the word "securities" in what Farwell J. holds to be its "strict and primary" sense—but in what may be called its "popular sense"—which I may observe is a sense in which I am of opinion, without the assistance of either dictionary or the evidence of commercial or other witnesses, it is applied habitually by those who have to deal with property transferable by the assignment of indicia of property, be they commercial men or non-commercial men, lawyers or laymen; and a sense in which it has been used daily in *The Times* since the year 1886, and in divers Acts of Parliament.

Now the reasons why I have formed this conclusion as to the meaning of the word "securities" in this will are these. Take this passage in the will: "And I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities." I think that in this passage "the same securities" obviously means "the same investments"; and I think that the effect of using the words "moneys invested" and the word "securities" to cover the same subject-matter is not to narrow down or limit the natural sense of the words "moneys invested," but to extend what Farwell J.

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considers to be the "strict and primary" meaning of the word "securities," so as to cover anything which, according to the strict and primary meaning of the words "moneys invested," would be covered or connoted by those words; and, in my judgment, property in the shape of railway shares falls within the meaning both of the words "moneys invested" and of the word "securities."

The moneys invested are authorized to be left and continued, quâ investment, in statu quo.

I wish to add—although it is not necessary to do so for the decision of this case, having regard to the ground upon which the Court is deciding it—that, in my judgment, the meaning of a word is relative to the circumstances and occasion and date on which the word is used; and that if a judge is entitled to take into consideration at all the fact that at the date of the will "securities" is largely used in a sense other than a pledge for an advance of money, or in the particular sense of "investments in property transferable by the assignment of indicia such as certificates," it is the duty of the judge to inform his mind, not only by reference to dictionaries of good reputation, but also by evidence of the meaning ordinarily given to such a word amongst those who deal in such property.

A rule prohibiting a judge from so doing would be, in my judgment, a most serious limitation of the rule that evidence is admissible for the purpose of explaining the meaning of the words used by the testator, as distinguished from evidence of the testator's intention, and would be also a serious limitation of the rule that for the purpose of explaining the meaning of the words used by the testator evidence is admissible of the circumstances surrounding the testator at the time of making his will. I think that evidence is admissible to shew that expressions used in the will had acquired an appropriate meaning, either generally, or by local usage, or amongst particular classes; and that, where any doubt arises upon the true sense and meaning of the words themselves or any difficulty as to their application under surrounding circumstances, "the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason

and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party": see the opinions of Parke B. and Tindal C.J. in *Shore* v. *Wilson* (1), and the judgment of Parke B. in *Richardson* v. *Watson*. (2) I quite recognise a decision that a word used in a technical sense in a legal instrument must be construed in its strict legal sense, which, in relation to such a document, is its "primary sense" although not necessarily its archaic sense or its popular sense at the date of the instrument; but I do not think that a decision like that in *Ogle* v. *Knipe* (3) controls the meaning of the word "securities" in a description of property disposed of by the testator. That case merely decides that in that particular will, at that date, the words "money and securities for money of every description" (very different words from the present) did not carry Bank of England stock and canal shares. The decision certainly did not impress a "technical meaning" on the word "securities," or limit for ever the meaning of the word "securities" to its narrow archaic meaning.

In my opinion, therefore, this appeal should be allowed.

ROMER L.J. In the absence of any context or admissible evidence from which it can be gathered that the word "securities" has another meaning, I agree with Farwell J. that it must be taken in a will to have the meaning stated by him; and that the expressions "securities for money" and "investment of money upon securities," and even the expression "investment of money in securities," would accordingly, in the absence of anything sufficient to negative that view, be held to apply only to securities in the sense above stated. But the word is a flexible one, and I recognise that it is largely used in a wider or different sense, and in particular is widely used as a synonym for "investments." Now in the present case, after much hesitation and with the doubt I generally feel on the rare occasions when I come to a different conclusion

(1) (1842) 9 Cl. & F. 355, 555-6, 566.

(2) (1833) 4 B. & Ad. 787, 799; 38 R. R. 366.

(3) L. R. 8 Eq. 434.

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from that arrived at by Farwell J., I think there is enough in the will in question to shew that the testator had used the word "securities" in the sense of "investments." I arrive at this conclusion chiefly from the clause in the will, "and I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities."

On the whole, I think that the testator, in the first part of this clause, intended, by the words "any moneys invested at my death," to refer to all investments of his moneys existing at the date of his death, and that by the words "the same securities" he meant "the same investments." This being so, I agree in thinking that the appeal should be allowed, for the word "investments" would cover investments by the testator in shares.

STIRLING L.J. The question on this appeal is whether the word "securities," as used in the will dated December 11, 1895, of Edward William Rayner (who describes himself as "of the city of Liverpool, in the county of Lancaster, general broker"), includes stocks and shares of railway and other companies.

Farwell J. has held that it does not, and his decision is in accordance with that of James V.-C. in 1869 in *Ogle* v. *Knipe* (1) on a will dated March 16, 1841. Although there is not to be found in the English reports any subsequent decision on the point, I believe that this case has been repeatedly followed by judges of the Chancery Division. It is said, however, that the meaning of the word has changed since 1869, and that, as ordinarily understood by mercantile men both in 1895 and at the present time, it includes stocks and shares as well as mortgages on land and other property.

As at present advised, I am not prepared to say that this contention is well founded, but I think it is unnecessary to decide the question, which is one of importance, on this occasion. Even assuming that, on the primary meaning of the word, it is limited to "money secured on property," still, as is laid down by Lord Cranworth in *Hicks* v. *Sallitt* (2), another meaning may be given to it if there be pointed out

(1) L. R. 8 Eq. 434. (2) (1853) 3 D. M. & G. 782, 794.

"either some inconsistency in different parts of the will, or a positive statement of such being the sense intended, or a reductio ad absurdum by not taking the word in a qualified sense." In *Abbott* v. *Middleton* (1) the same learned judge says: "Where by acting on one interpretation of the words used we are drawn to the conclusion, that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate." This passage was quoted with approval by Lord Cairns in *Gordon* v. *Gordon.* (2)

Now the passage to be construed is this: "I declare that all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit: and I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities." If in the second of these sentences the word "securities" is limited to money secured on property, the result would be that if the testator at the time of his death had standing in his own name two parcels of shares, one being an investment of his own while the other was only security for an advance of money, the trustees would be at liberty to retain the latter but not the former. I think that such a course would be "capricious and without any intelligible motive" on the part of the testator, who, it is to be remembered, was a business man.

In my opinion, therefore, the word "securities" in both sentences ought to be held to mean "investments." Accordingly I agree that this appeal should be allowed.

Solicitors: *Wynne & Sons, for Evans, Lockett & Co., Liverpool; Van Sandau & Co., for Wright, Becket, Wright & Co., Liverpool; H. Forshaw & Hawkins, Liverpool.*

(1) (1858) 7 H. L. C. 68, 89. (2) (1871) L. R. 5 H. L. 254, 284.

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BYRNE J.
Dec. 18.
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Feb. 16, 28.
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Nov. 18, 19;
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NICHOLAS *v.* RIDLEY.

[1902 N. 244.]

Real Estate — Mortgage — Foreclosure — Successive Incumbrances — Tenant for Life of Equity of Redemption — Transfer of First Mortgage to Second Mortgagee — Covenant by Tenant for Life for Payment of First Mortgage Debt — Collateral Security — Surety — Principal Debtor — Payment by Surety — Tacking — Consolidation — Postponement of Surety.

R. was tenant for life of real estate subject to a first mortgage to S. and to a second mortgage (which included additional property) to N., both created by R.'s predecessors in title. Subsequently N. paid off the first mortgage and took a transfer of it, R., the tenant for life, who had been keeping down the interest on both mortgages, joining by covenanting with N. for payment of the first mortgage debt, with a proviso that, as between R., his heirs, &c., estate and effects on the one part, and the first mortgaged premises and the owner or owners for the time being thereof on the other part, the said premises should be the primary fund for payment of the first mortgage debt, and that R.'s covenant should be "only a collateral security" for such payment, but that, notwithstanding, N., his executors, &c., might resort to either means for enforcing payment in preference to such other means.

R. and N. being both dead, a mortgagee's action was brought by N.'s representatives against R.'s representatives, claiming payment of the first mortgage debt pursuant to R.'s covenant, and also the right to tack the second mortgage to the first. The defendants contended that R. had covenanted as a surety, and that, therefore, on payment by them of the first mortgage debt they would be entitled to stand in the place of the plaintiffs, the first mortgagees, and to have an assignment of the securities for that debt. At the trial of the action, which proceeded on the assumption that R. had entered into the covenant as surety and not as principal debtor:—

Held, by Byrne J., though with reluctance, that he was bound by *Farebrother* v. *Wodehouse*, (1856) 23 Beav. 18, and that, therefore, the plaintiffs could, as mortgagees, at the same time enforce payment of the first mortgage debt under R.'s contract of suretyship, and claim the right to tack the second mortgage to the first as against the right of the surety to the transfer of securities; also that the defendants would not, on making such payment, be entitled, under a foreclosure judgment, to a rateable proportion of the securities held by the plaintiffs for both debts.

On appeal—

Held, by Romer and Stirling L.JJ. (Vaughan Williams L.J. dissenting), that upon the construction of the transfer and of R.'s covenant therein, R. was a principal debtor and not a surety, and that consequently, upon the authority of *Duncan, Fox & Co.* v. *North and South Wales Bank*,

(1880) 6 App. Cas. 1, 11, and *Newton* v. *Chorlton*, (1853) 10 Hare, 646, neither he nor his representatives could claim the rights of a surety as against either N. or his representatives. The appeal was, therefore, dismissed with costs:

Held, by Vaughan Williams L.J., that, upon the construction of the proviso to the covenant by R. to pay the first mortgage debt, R. was to have the rights of a surety and to be entitled to an assignment of the first mortgage on payment of the principal and interest.

On July 2, 1821, certain copyhold lands of the manor of Claverley were mortgaged by Richard Ridley to William Stringer to secure 1500*l.* and interest.

Richard Ridley died about the beginning of the year 1830, but nothing was at present known respecting his estate, or as to who became his representatives.

On April 21, 1842, one George Ridley mortgaged the equity of redemption of the said lands, together with certain additional copyhold lands of the said manor, to William Nicholas, to secure 2500*l.* and interest.

By a deed of March 21, 1874, the 1500*l.* mortgage was transferred by J. H. Law and J. Corder, the representatives of William Stringer (who was then dead), to William Nicholas, the second mortgagee. At the date of that deed of transfer one Samuel Ridley was tenant for life of all the mortgaged premises, and was paying the interest on the two principal mortgage debts of 1500*l.* and 2500*l.*—on the former to Stringer's representatives, and on the latter to William Nicholas. Samuel Ridley was a party to that deed, which contained the following recital: "And whereas the said J. H. Law and J. Corder having required payment of the said sum of 1500*l.*, the said W. Nicholas, at the request of the said Samuel Ridley, party hereto, has agreed to pay to the said J. H. Law and J. Corder the said sum of 1500*l.* upon having such transfer as hereinafter mentioned of the said principal sum of 1500*l.* and interest and the securities for the same, and upon having the payment of the said principal sum and interest further and collaterally secured by the covenant of the said Samuel Ridley, party hereto, hereinafter contained." The covenant by Samuel Ridley was as follows: "And the said Samuel Ridley, party hereto, doth hereby for himself, his heirs, executors, and

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administrators, covenant with the said William Nicholas, his executors and administrators, that he the said Samuel Ridley, party hereto, his heirs, executors, or administrators, or other the person or persons for the time being entitled to the equity of redemption of the said premises, will pay to the said William Nicholas, his executors, administrators, or assigns, on demand by him or them, the said sum of 1500*l.*, or so much thereof as shall for the time being remain unpaid, and all interest which shall be due thereon: Provided nevertheless that as between the said Samuel Ridley, party hereto, his heirs, executors and administrators, estate and effects on the one part, and the said copyhold premises and the owner or owners for the time being of the said copyhold premises on the other part, the said copyhold premises shall be considered as the primary fund for the payment of the said principal sum and interest, and the covenant of the said Samuel Ridley, party hereto, shall be only a collateral security to the said William Nicholas, his executors, administrators, and assigns, for the payment of the said principal sum and interest, but that notwithstanding the said William Nicholas, his executors, administrators or assigns, shall be at liberty to resort to either means for procuring or enforcing the payment of the said principal sum and interest, or any part or parts thereof respectively, in preference to such other means." And the transfer also contained covenants for title by Samuel Ridley and by the said J. H. Law and J. Corder.

William Nicholas died on December 22, 1882.

In April, 1894, the absolute interest in reversion expectant on the death of Samuel Ridley in all the copyholds comprised in the securities became vested (subject to those securities) in his son, Samuel Ridley.

Samuel Ridley, the father, died on November 12, 1896.

The plaintiffs, who were the representatives of William Nicholas, demanded from the defendants, who were the executors of Samuel Ridley, the father (one of them being his said son, Samuel Ridley), payment of the 1500*l.* and arrears of interest pursuant to his covenant contained in the transfer, and brought this action for an account of what was due on the

securities; a declaration that they were entitled, as against the defendants, to tack their security for 2500*l.* to the 1500*l.* mortgage; payment by the defendants as executors of Samuel Ridley, pursuant to his covenant in the deed of transfer, of what should be found due on the 1500*l.* mortgage; foreclosure or sale of the mortgaged premises; and, if necessary, a receiver.

The defendants alleged in their statement of defence that Samuel Ridley had entered into the covenant as surety only. They contended that the plaintiffs were not entitled to tack, and that on payment by them (the defendants) of the 1500*l.* and interest they (the defendants) would be entitled to have assigned to them the securities held by the plaintiffs in respect of the 1500*l.*, and to stand in the place of the plaintiffs in respect of the same. In the alternative they urged that, if the plaintiffs were entitled to tack, they, the defendants, would be entitled to a rateable proportion of all the securities held by the plaintiffs: further, that if the plaintiffs, after having received the amount due in respect of the 1500*l.* mortgage from the defendants, proceeded to a sale of the mortgaged property in respect of the 2500*l.*, the plaintiffs would be liable to account to the defendants for the said sum of 1500*l.* and interest out of the proceeds of such sale. In conclusion the defendants stated that they would rely both on the Mercantile Law Amendment Act, 1856, and on the construction of the deed of transfer.

The action came on for trial before Byrne J. on December 18, 1902.

Levett, K.C., *Brinton*, and *A. T. Murray*, for the plaintiffs. Apart from any question as to the rights of the surety, the plaintiffs are clearly entitled to tack their security of April 21, 1842, to the 1500*l.* mortgage, and this right overrides the right of the surety to have the benefit of the securities for that portion of the debt for which he was surety: *Farebrother* v. *Wodehouse* (1), a decision which is precisely in point and governs this case, though the attention of the Court does not seem to have been called to s. 5 of the Mercantile Law Amend-

(1) 23 Beav. 18.

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ment Act, 1856 (19 & 20 Vict. c. 97). *Forbes* v. *Jackson* (1), where *Farebrother* v. *Wodehouse* (2) is considered, is distinguishable; for in *Forbes* v. *Jackson* (1) it was admitted that the subsequent advances were made without the surety's knowledge and consent. *In re Kirkwood's Estate* (3) only decides that for subsequent mortgages the surety is free from the right to tack. *Farebrother* v. *Wodehouse* (2) is the only authority on a case of simultaneous dealing like the present. The surety in this case was fully aware of what he was doing: he knew that he was guaranteeing a debt already secured. [De Colyar's Law of Guarantees, 3rd ed. pp. 323 to 325, was referred to.]

Rowden, K.C., and *Marcy*, for the defendants. *Farebrother* v. *Wodehouse* (2) cannot now be relied on; it goes too far, and was not approved by Hall V.-C. in *Forbes* v. *Jackson.* (1) Samuel Ridley, the surety, before he became surety, was not liable to pay either of these mortgages: William Nicholas knew perfectly well at the time what Samuel Ridley was becoming surety for; and where the creditor is a party to or has notice of the contract of suretyship, the surety on redeeming is entitled to the benefit of all securities given by the principal debtor to his creditor, either at the creation of the contract or during its subsistence. *Forbes* v. *Jackson* (1) and the Mercantile Law Amendment Act, 1856, s. 5, are in favour of the surety. In a case like this the mortgagee cannot consolidate against the surety: *In re Kirkwood's Estate* (3); Ashburner on Mortgages, p. 283.

Levett, K.C., in reply.

Cur. adv. vult.

1903. Feb. 16. BYRNE J. Notwithstanding differences which exist between the facts of the present case and the facts in the case of *Farebrother* v. *Wodehouse* (2), and although the mortgagee's rights there depended on the equitable principles in relation to consolidation, while in the present case the principles in relation to tacking are also involved, I am unable fairly to differentiate the two cases so as to say that the

(1) (1882) 19 Ch. D. 615. (2) 23 Beav. 18.
(3) (1878) 1 L. R. Ir. 108.

decision in that case is not an authority on the question I have now to deal with. *Farebrother* v. *Wodehouse* (1) was decided in the year 1856, and upon the appeal (which was compromised) was stated by the Lords Justices (as appears from the report) (2) to be one involving the establishment of a difficult and obscure equity.

The decision on the actual point arising in that case has never been overruled, although, so far as it purported to be founded upon authority, it cannot be relied on, *Williams* v. *Owen* (3) being no longer law: see *Forbes* v. *Jackson* (4) and the cases there referred to, and *In re Kirkwood's Estate* (5); but Lord Romilly clearly based his judgment upon principle independently of the authority to which he referred, as appears from the language of his judgment.

Neither the arguments on behalf of the defendants, nor a subsequent examination of later authorities upon the subjects of tacking and consolidation which have displaced some of the older cases, nor a consideration of the terms of s. 5 of the Mercantile Law Amendment Act of 1856 (which was passed between the argument and judgment in *Farebrother* v. *Wodehouse* (1)), have persuaded me that I am at liberty to approach the matter as if it were res integra. If I were, I confess I should feel considerable hesitation before holding that, under circumstances like those of the present case, the mortgagee could at the same time enforce or sue for payment of the debt due from the surety and set up his right to tack or consolidate against the right of the surety to a transfer of securities, whatever might be the case if the surety instituted proceedings to redeem. As matters stand, I consider that I ought to follow *Farebrother* v. *Wodehouse* (1), and accordingly to hold, as I do, that the right of the plaintiffs, the mortgagees, must prevail.

Feb. 28. Minutes of the proposed order were now submitted to the Court.

(1) 23 Beav. 18.
(2) 23 Beav. 18; 26 L. J. (Ch.) 240.
(3) (1843) 13 Sim. 597; 60 R. R. 415.
(4) 19 Ch. D. 615.
(5) 1 L. R. Ir. 108.

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Levett, K.C., *Brinton*, and *A. T. Murray*, for the plaintiffs.

Rowden, K.C., and *Marcy*, for the defendants. There will be a declaration that the plaintiffs are entitled to tack the two mortgages: and does your Lordship also hold that the defendants are not entitled to a rateable proportion of the securities?

[BYRNE J. Yes. Whatever your rights might be on a sale, I do not see that you have any in a foreclosure action. If you are foreclosed your interest is gone as against the mortgagee.]

Even if an order for foreclosure is made the right of the sureties is not at an end. They cannot be absolutely foreclosed. They have a right to contribution, and the property remains subject to their rights. A surety who pays the debt is entitled to have the securities apportioned. In this case, on payment of the 1500*l.* we shall be entitled to three-eighths of the securities. This will not prevent foreclosure, but the mortgagees will take the property subject to our claims, i.e., they must account to us in the capacity of equitable owners.

[BYRNE J. I could apportion proceeds of sale; but how can I apportion the securities? If you have any rights they would come in before foreclosure.]

We only ask for a declaration that we are entitled to three-eighths of the securities: *Coates* v. *Coates*. (1) The principle is that the Court marshals the securities in favour of the surety.

[BYRNE J. That has no application to a foreclosure.]

Pearl v. *Deacon* (2) is to the same effect.

[BYRNE J. That was also an application of proceeds of sale. In such cases the Court applies the money rateably, because everything received in respect of the debt must be applied in accordance with the bargain with the surety; for otherwise he will be discharged.]

If the plaintiffs foreclose, they will become trustees of the property for us to the extent of three-eighths: *Newton* v. *Chorlton*. (3) There is no difference between the case of proceeds of sale and unsold land. We are entitled to an order for sale under s. 25, sub-s. 2, of the Conveyancing Act, 1881; but

(1) (1864) 33 Beav. 249, 252.
(2) (1857) 24 Beav. 186, 192; on appeal 1 De G. & J. 461.
(3) 10 Hare, 646.

the deficiency is so great that we should gain nothing by a sale if your Lordship is against us on both these points.

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BYRNE J. I am against the defendants on both points. This will, of course, not prejudice their rights against the principal debtor.

No further judgment was delivered.

The minutes were then settled substantially as follows:—

Judgment for the plaintiffs for the sum of 1708*l.* 3*s.*, being the total of the principal sum of 1500*l.*, and 208*l.* 3*s.* for interest at 5 per cent., which sum the defendants admitted to be due under the covenant of Samuel Ridley, the father, and also so much of the costs of the action as would have been incurred if it had been brought for payment only. "Declare that the defendants are not entitled, on payment to the plaintiffs of the moneys payable to them as above, to have assigned to them the securities held by the plaintiffs for the principal sum of 1500*l.* and interest, and are not entitled, on such payment by the defendants as aforesaid, to a rateable proportion of the said securities, but that the plaintiffs are entitled, as against all the defendants, as executors of Samuel Ridley, the father, to hold the mortgaged hereditaments as mortgagees thereof, redeemable only upon payment of all moneys due on the security of the deed of April 21, 1842, and of the 1500*l.* mortgage." Usual directions in a foreclosure action.

H. C. R.

C. A.

The defendants appealed from so much of the judgment as contained the above declaration and as gave relief consequential thereon.

The appeal was heard on November 18 and 19, 1903.

Rowden, K.C., and *Marcy*, for the defendants. The decision of Byrne J. on the point as to tacking was founded on *Farebrother* v. *Wodehouse* (1); but we submit that that case is wrong and ought not to be followed. If, however, the plaintiffs can tack these mortgages against us, then we must be entitled to a rateable proportion of the securities. The surety's right attached first. There was no moment of time at which Nicholas had tacked prior to the right of the surety attaching.

The first question raised on this appeal is one which was not raised in the Court below, namely, whether Samuel Ridley was,

(1) 23 Beav. 18.

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under the transfer of 1874, really in the position of a surety: we submit that he was. The charge here is primarily on the land, and he, as being tenant for life and the person on whom the equity of redemption had devolved, became, upon the transfer of the mortgage for 1500*l.* and his entering into the covenant for payment, in the position of a surety: *Evelyn* v. *Evelyn* (1); *Leman* v. *Newnham* (2); *Bagot* v. *Oughton.* (3) Being then in the position of a surety, he is entitled to stand in the place of the mortgagee whom he pays off, and to take over the mortgagee's securities. There is no reason why the surety should lose that right merely because he happens to be tenant for life. A tenant for life who pays off a mortgage debt is in just as good a position as any one else who pays off. The bargain under the deed of 1874 was, in effect, that Samuel Ridley should join as surety, and there is nothing in the deed to shew that he was to be in a worse position because he was tenant for life. Upon the face of the deed the relation is that of principal and surety. The proviso is clear that the copyhold premises are to be the primary fund for payment of the mortgage debt, and that Samuel Ridley's covenant is to be a collateral security only: all that he did was to guarantee the one debt.

With regard to the point as to tacking, it is clear that a mortgagee cannot tack or consolidate as against a surety: the surety, on paying off the debt of his principal, is entitled to a transfer of all the securities held by the creditor in order to make them available against the debtor: *Bowker* v. *Bull.* (4)

[ROMER L.J. I doubt whether the word "surety" is applicable to a case like this.]

Perhaps it would be more correct to say this is a case of quasi-suretyship.

[ROMER L.J. If the tenant for life surety had come to redeem, could he say that there was no right of tacking or consolidation as against him?]

If he is a surety, he is under no personal disqualification because he happens to fill the position of tenant for life of the

(1) (1731) 2 P. Wms. 659, 664.
(2) (1747) 1 Ves. Sen. 51.
(3) (1717) 1 P. Wms. 347.
(4) (1850) 1 Sim. (N.S.) 29, 34.

equity of redemption, which position alone would, no doubt, not enable him to dispute tacking or consolidation. As surety he is entitled to fall back upon his security.

The learned judge below based his decision on *Farebrother* v. *Wodehouse* (1), where Lord Romilly M.R. held, under circumstances resembling the present, that the right of the mortgagee to retain the securities for both debts until paid overrode the right of the surety to have the benefit of the securities for the one debt for which he was surety. But we submit that that decision ought not to be now followed. It has been doubted in *Forbes* v. *Jackson* (2) and in *In re Kirkwood's Estate* (3), and also in the text-books: Coote on Mortgages, 5th ed. p. 911; Davidson's Conveyancing Precedents, 4th ed. vol. ii. Pt. II. pp. 506–7. The true principle is that the surety's hard bargain is not to be made worse for him merely because he happens to have covenanted for payment of one of two mortgage debts. Lord Romilly was evidently relying upon *Williams* v. *Owen* (4) as being good law notwithstanding *Bowker* v. *Bull.* (5)

[*Levett, K.C.*, for the plaintiffs. I admit that *Williams* v. *Owen* (4) is not now law.]

Then we rely on s. 5 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), which provides that every person who, being surety for the debt or duty of another, shall pay such debt or perform such duty shall be entitled to have assigned to him every security held by the creditor in respect of such debt or duty, and to stand in the place of the creditor. *Farebrother* v. *Wodehouse* (1) was argued on June 27, 1856, before that Act came into operation, which was on July 29 in the same year. On November 4 in the same year Lord Romilly M.R. delivered his considered judgment, but without making any reference to the Act which had been passed in the interval, so that the decision in that case must be regarded as quite independent of the Act, which we submit, altogether apart from principle and authority, gives us the right we ask.

(1) 23 Beav. 18.
(2) 19 Ch. D. 615.
(3) 1 L. R. Ir. 108.
(4) 13 Sim. 597; 60 R. R. 415.
(5) 1 Sm. (N.S.) 29, 34.

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[ROMER L.J. It seems to me that the section only applies to a surety properly so called. My impression is that Samuel Ridley was not a "surety" in the strict sense of the term—that is, he was not "surety for the debt or duty of another."]

At all events, when he put his hand to the deed of 1874, he became liable for the mortgage debt of 1500*l.*

Since *Forbes* v. *Jackson* (1), where *Farebrother* v. *Wodehouse* (2) was referred to, it must be taken to be now settled that the right to tack which a mortgagee has against the mortgagor is defeated by the interposition of the surety: *In re Kirkwood's Estate.* (3) Byrne J., in following *Farebrother* v. *Wodehouse* (2), evidently did so with reluctance, and we submit that that decision is not satisfactory and should now be definitely overruled.

Secondly, we submit that, in the event of the Court holding that the plaintiffs have a right to tack, the defendants, in discharging Samuel Ridley's obligation as surety, in respect of a portion of the whole mortgage debt, are entitled, in respect of that portion, to all the rights of a creditor: *Hobson* v. *Bass* (4); *In re Sass.* (5)

Levett, K.C., and *A. T. Murray*, for the plaintiffs. The first question is, What is the true construction of the deed of transfer of 1874? We submit that it clearly gave William Nicholas the right to tack the security for 2500*l.* to the security for 1500*l.* That is what he bargained for; and he also demanded that, as a collateral security, Samuel Ridley, the tenant for life of the mortgaged property, should enter into the covenant for payment, all parties to the deed being aware of the existence of the mortgage for 2500*l.* and, consequently, of the right to tack. It is not common sense to suppose that the mortgagee was giving up his right to tack: so far from his giving up anything, he was asking for additional security. By the deed there is an assignment and transfer of the debt. That comes first, and then, secondly, comes the covenant; so that the debt was

(1) 19 Ch. D. 615, 619.
(2) 23 Beav. 18.
(3) 1 L. R. Ir. 108.
(4) (1871) L. R. 6 Ch. 792, 794.
(5) [1896] 2 Q. B. 12, 15.

vested in William Nicholas, coupled with his right to tack a moment before the covenant.

[VAUGHAN WILLIAMS L.J. But the recitals shew that the bargain was all one transaction, entered into at the same time. The precise order in which it was carried out is immaterial.]

We submit that the deed should be read in the order we have stated. The covenant must necessarily follow the assignment, for it is entered into on the sole ground that the debt has been previously assigned. Therefore the covenant must be regarded as wholly ancillary to the previous assignment: without that assignment it would be meaningless. Under that assignment the plaintiffs have the right to tack, and it is impossible to hold that that right has been taken away by the covenant. Samuel Ridley was not in the position of a mere surety, and the deed of 1874 itself does not say he is a surety; and, moreover, his position as tenant for life was inconsistent with his incurring the obligation of surety. Being tenant for life of the equity of redemption, his real object in entering into the covenant was the protection of the estate, or his interest in it, by preventing foreclosure. He could not have claimed the benefit of s. 4 of the Statute of Frauds (29 Car. 2, c. 3), as being under an undertaking to answer for the debt, default, or miscarriage of another, for that statute does not apply where, as here, the person entering into the undertaking has himself an interest in the property which is the subject of the undertaking: *Fitzgerald* v. *Dressler* (1); *Harburg India Rubber Comb Co.* v. *Martin.* (2) Again, a tenant for life of an estate subject to successive mortgages can only redeem in the order in which the securities rank: he cannot, by paying off a first mortgage, claim to stand in the shoes of the first mortgagee. Any payment made by him must enure for the benefit of the estate and the incumbrancers thereon, and he cannot claim to have made them as surety: *In re Davison's Estate.* (3) But the real question here is as to the meaning of the proviso in Samuel Ridley's covenant in the deed of 1874. Does it cut down the right of the mortgagee, or is it merely intended to define the

(1) (1859) 7 C. B. (N.S.) 374, 392.
(2) [1902] 1 K. B. 778.
(3) (1893) 31 L. R. Ir. 249, 256-7; [1894] 1 I. R. 56.

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rights as between the tenant for life and the remaindermen? We submit that it does not affect the mortgagee at all, and that its meaning is simply to regulate the rights of the tenant for life and the remaindermen as between themselves by providing that the estate shall be treated as the primary fund to bear the burden. There was no intention on the part of William Nicholas, the mortgagee, to give up any rights he had.

But even assuming that Samuel Ridley was in the position of a surety under the deed, still he had no higher right than his debtor had at the time the instrument of suretyship was entered into. A surety is not at liberty to keep the good security and leave the bad. *Farebrother* v. *Wodehouse* (1) exactly covers this case. There it was held that, in the absence of contract, the fact that a third person has become surety for one of two mortgage debts does not deprive the mortgagee of his right to tack, and that payment of the debt for which that third person is surety does not entitle him to redeem the mortgaged property without also paying the other debt and so redeeming the whole property. In short, the surety cannot be in a better position than the debtor himself. That case, though sometimes doubted, has never been overruled, and should, we submit, still be treated as good law. The cases that have been cited on the other side do not really touch this point. A mortgagee does not lose his right to tack merely because he accepts a surety as a collateral security; if he intends to give up his right, that must be a matter of contract.

Rowden, K.C., in reply. It is said that we are taking away from the mortgagee his right to tack as against us; but that is not so, for he has no such right. The right of a surety to stand in the place of the creditor he pays off is clear, and the mere fact of his filling a double character does not deprive him of his rights. Here, upon the terms of the deed, the mortgagee took Samuel Ridley as a surety. If he intended to preserve his right to consolidate and tack, that should have been so stated. Here the ordinary mortgagee's right of con-

(1) 23 Beav. 18, 23, 27.

solidation and tacking does not "arise out of the transaction itself of which the suretyship forms a part": *Farebrother* v. *Wodehouse*. (1) Whether Samuel Ridley was strictly a surety or not, upon the terms of this deed he had the rights of a surety: he was, in fact, a quasi-surety, against whom the right of consolidation should not be urged.

Cur. adv. vult.

Dec. 21. VAUGHAN WILLIAMS L.J. read the following judgment. After stating the facts, and the contentions of the parties as set out in the pleadings, his Lordship proceeded:— Byrne J. held that the plaintiffs were right in their contention, and that as mortgagees they could at the same time enforce payment under the covenant and set up a right to tack against the right of the surety to a transfer of securities.

Byrne J., in thus deciding, considered himself bound so to do by reason of the decision in *Farebrother* v. *Wodehouse*. (2)

Now, before this question as to the rights of the defendants to a transfer of the securities can arise, it is necessary first to decide whether Samuel Ridley did, under the deed of 1874, either become a surety or become entitled to a right to have a transfer of securities on payment, such as a surety would have. This would be mainly a question of the construction of the deed of 1874, but one will have also to take into consideration the facts recited in that deed to which I have already referred.

It is argued that in this state of things Samuel Ridley, being the tenant for life of the equity of redemption and therefore deeply interested in preventing a foreclosure, could not claim that he took upon himself as surety the obligation to pay the 1500*l*. mortgage debt. It is said that he incurred this obligation as tenant for life for the purpose of protecting his interest as such, and that the recited fact that Nicholas, at the request of Samuel Ridley, agreed to pay off the persons then entitled to a first mortgage, is consistent with the obligation being taken by Samuel Ridley as tenant for life for the protection of the estate, and inconsistent with the obligation being taken as surety. Now, for my own part, if there were nothing else in

(1) 23 Beav. 27. (2) 23 Beav. 18.

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the deed militating against this view, I should be inclined to construe the deed so as to negative the obligation being taken by Samuel Ridley as surety, or under conditions which gave him the right to a transfer of securities on payment of the 1500*l.*, notwithstanding the fact that undoubtedly he did, by entering into the covenant, take upon himself the personal liability which did not previously rest upon him.

But there is something more to be considered in the deed, and that is, What is the meaning and construction of the proviso to the covenant? The first part of the proviso runs as follows: "Provided nevertheless that as between the said Samuel Ridley, party hereto, his heirs, executors and administrators, estate and effects on the one part, and the said copyhold premises and the owner or owners for the time being of the said copyhold premises on the other part, the said copyhold premises shall be considered as the primary fund for the payment of the said principal sum and interest, and the covenant of the said Samuel Ridley, party hereto, shall be only a collateral security to the said William Nicholas, his executors, administrators, and assigns, for the payment of the said principal sum and interest." Primâ facie, this proviso should relate to a subject-matter which could be controlled by the contract of the covenantor and the covenantee, and this is true even in relation to that part of the proviso which is governed by the words "as between the said Samuel Ridley, party hereto, his heirs, executors and administrators, estate and effects on the one part, and the said copyhold premises and the owner or owners for the time being of the said copyhold premises on the other part"; for Samuel Ridley and Nicholas cannot by their covenant control the relations of Samuel Ridley and the owners for the time being of the mortgaged estate otherwise than by an agreement inter se.

Now, what is it that the parties to the deed contract shall be the effect of the deed as between Samuel Ridley and his estate and effects and the copyhold premises (the mortgaged premises) on the one part, and the owner or owners for the time being of the premises on the other part? It is that, as between Samuel Ridley and the owners of the copyhold premises for the time

being, the copyhold premises shall be considered as the primary fund for the payment of the principal sum and interest, and that the covenant of Samuel Ridley shall be only a collateral security to Nicholas for the payment of the principal and interest; but it is plain that by their mere covenant Samuel Ridley and Nicholas cannot affect the relations of Samuel Ridley to persons who are not parties to the deed nor representatives of parties to the deed. Now, how can the contracting parties bring this about by anything that they can do, and in what possible state of things that can be contemplated as arising can Samuel Ridley and Nicholas have to consider the copyhold premises as the primary fund, or the covenant as collateral security to Nicholas for the payment of principal and interest as between Samuel Ridley and the copyhold premises and the owners for the time being? It seems to me that this occasion for thus considering the copyhold premises and the covenant can only arise if it is sought, at the instance of Samuel Ridley, to enforce the mortgage security against the copyhold premises as the primary fund in a case where Samuel Ridley has paid under his covenant which the parties to the deed agree shall, as against the owners for the time being of the mortgaged estate, be considered as collateral security.

Now let us see how the proviso continues. It goes on: "But that notwithstanding the said William Nicholas, his executors, administrators, or assigns, shall be at liberty to resort to either means for procuring or enforcing the payment of the said principal sum and interest, or any part or parts thereof respectively, in preference to such other means." What does that mean? "But that notwithstanding" what? I think it means that, notwithstanding the fact that the parties to the deed have agreed that, as between Samuel Ridley and the copyhold premises on the one hand, and the copyhold premises and the owners for the time being on the other hand, the copyhold premises are to be the primary fund and the covenant merely a collateral security, yet Nicholas was to be entitled to enforce his remedies in any order he might choose.

This might be quite easily expressed as between Samuel Ridley and Nicholas, without any mention of the relation of

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Samuel Ridley to the copyhold premises or the owners for the time being. I think that the most reasonable interpretation to put upon this proviso is to say that it means that, although Samuel Ridley is to have the rights of a surety as against the copyhold premises and the owners for the time being, yet this is not to prejudice the right of Nicholas to enforce his securities, primary and collateral, in any order he may choose. If this is the true meaning, I do not see how it can be carried out—that is, how Samuel Ridley, as between himself and the copyhold premises and the owners for the time being, can effectively make the copyhold premises the primary security or treat the covenant as collateral security—unless Nicholas, upon payment of the principal and interest, was bound to assign to Samuel Ridley the 1500*l.* mortgage.

It cannot be said that "principal and interest" in this proviso means the 2500*l.* as well as the 1500*l.* Nor do I think that it could be said that either the request of Samuel Ridley to Nicholas to pay off the 1500*l.*, or the interest of Samuel Ridley as tenant for life, makes it wrong to give this construction to the proviso.

This construction, in my judgment, makes it unnecessary to consider the questions raised in *Farebrother* v. *Wodehouse* (1) and other cases as to how far the rights of a surety may prejudice the right of a mortgagee to tack or consolidate, or how far the rights of the mortgagee to tack or consolidate may prejudice the right of the surety who pays off the mortgage debt to have the benefit of the mortgage securities. The relative rights of the parties to the deed of 1874 are, in my judgment, defined by the deed itself when properly construed. The observations which I have made as to the request of Samuel Ridley and as to his interest as tenant for life apply equally to the objection that until Samuel Ridley gave the collateral covenant no one had incurred any personal liability to pay the principal and interest, but the land itself was the only security. I think that this appeal should be allowed on the grounds which I have mentioned, which were not argued or discussed before Byrne J.

(1) 23 Beav. 18.

I have arrived at this conclusion with considerable hesitation, and regretting that I find myself compelled to differ from my learned brethren, but in doing so I base my judgment entirely upon the construction of the deed.

STIRLING L.J. read the following judgment, in which he said ROMER L.J. concurred:—The question on this appeal is whether (as the learned judge in the Court below has held) the plaintiffs are entitled, as against the defendants, to tack a security dated April 21, 1842, to a security which bears date July 2, 1821, and was by a deed dated March 21, 1874, transferred to William Nicholas, the testator of the plaintiffs. To the last-mentioned deed one Samuel Ridley, the defendants' testator, was a party, and he thereby covenanted for the payment of the principal and interest secured by the deed of July 2, 1821. The defendants allege that Samuel Ridley joined in the deed as a surety; and that they, as his representatives, on payment of the principal and interest in question, are entitled to all the rights of sureties, and in particular to have a transfer to themselves of the securities for the debt so paid in the hands of the plaintiffs.

The deed of July 2, 1821, was a mortgage by one Richard Ridley to William Stringer of certain copyholds to secure 1500*l.* and interest.

The deed of April 21, 1842, was a mortgage by one George Ridley to William Nicholas of the equity of redemption of the copyholds comprised in the deed of July 2, 1821, and of certain additional real estate, by way of security for the sum of 2500*l.* and interest.

In March, 1874, Samuel Ridley, already mentioned, was tenant for life of all the real estate comprised in the securities of 1821 and 1842, and the security of 1821 had become vested in two persons named J. H. Law and J. Corder. The circumstances which led to the execution of the deed of 1874 are thus stated in the last of the recitals contained in that instrument: [His Lordship then read the recital above quoted, and continued:—]

Nothing further is known with reference to the transaction,

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which on the face of the deed itself was not one of suretyship on the part of Samuel Ridley in the ordinary sense in which that term is used, namely, as denoting an engagement to answer for the debt of another person. The debt of 1500*l.*, for which the security was originally given, was contracted by Richard Ridley in 1821, and he died not later than the beginning of 1830. It does not appear whether he left any personal estate out of which the persons entitled to his real estate might, according to the law then in force, have required payment of his debt: if such personal estate existed in 1830, it is highly improbable that it was available in 1874. Further, it does not appear whether in March, 1874, there existed any legal personal representative of Richard Ridley: if there was such a representative, he was no party to the deed of March 21, 1874, or the transaction of which that deed was the result and embodiment.

So far as that transaction is stated in the recital, it seems to be one in which Samuel Ridley took on himself the obligations of a principal debtor rather than a surety; but the true nature of his liabilities and rights must be determined upon a consideration of the terms of the whole deed. Now, on this point the most relevant parts of the deed are the covenant for payment and the proviso by which it is followed. The covenant is that of a person taking on himself the obligations of a principal debtor; if any of the rights of a surety were given to Samuel Ridley, he obtained them by the first two clauses of the proviso. These clauses are, according to the ordinary grammatical construction of them, governed by the introductory words, "as between the said S. Ridley, party hereto, his heirs, executors and administrators, estate and effects on the one part, and the said copyhold premises and the owner or owners for the time being of the said copyhold premises on the other part"; and whatever rights he thereby acquired exist only as thereby limited. This appears to be made quite clear by the third clause of the proviso, namely, "but that notwithstanding the said William Nicholas, his heirs, executors, administrators or assigns, shall be at liberty to resort to either means for procuring or enforcing the payment

of the said principal sum and interest, or any part or parts thereof respectively, in preference to such other means"; so that Nicholas thereby reserved to himself and his representatives full right to deal with the security acquired by the deed of March 21, 1874, as he saw fit.

The effect of the whole proviso, therefore, appears to me to be that Samuel Ridley preserved, as against the remaindermen, whatever rights he might have, on paying the principal sum of 1500*l.*, to resort for recoupment to the property of those remaindermen (see *Adams* v. *Angell* (1)), but that, as between himself and Nicholas, he was a principal and not a surety. The legal consequence which flows from this relationship is thus stated by Lord Selborne in *Duncan, Fox & Co.* v. *North and South Wales Bank* (2): "If, so far as the creditor is concerned, there is no contract of suretyship, if the person who has (in fact) made himself answerable for another man's debt is, towards the creditor, no surety, but a principal, then I think that the creditor would not be subject to those special obligations which were described by Lord Truro in *Owen* v. *Homan* (3), and would not, generally, have his powers of dealing with securities circumscribed and restricted in the manner described by Wood V.-C. in *Newton* v. *Chorlton* (4), and by Lord Romilly and the Lords Justices in *Pearl* v. *Deacon*." (5) The case of *Newton* v. *Chorlton* (6) is a leading authority in support of the rights claimed by the plaintiffs in the present action.

In my opinion, the plaintiffs have not established that their testator was entitled to the rights of a surety as against William Nicholas or the defendants who represent him, and consequently this appeal ought to be dismissed.

Solicitors: *Sole, Turner & Knight, for E. W. Haslewood, Bridgnorth; Chester & Co., for A. H. Thorn-Pudsey, Ironbridge.*

(1) (1877) 5 Ch. D. 634.
(2) 6 App. Cas. 1, 11.
(3) (1851) 3 Mac. & G. 378, 396-7.
(4) 10 Hare, 651.
(5) 24 Beav. 186; 1 De G. & J. 461.
(6) 10 Hare, 646.

G. I. F. C.

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Dec. 2, 3.

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[1902 W. 2761.]

Market—Franchise—Market Rights—Rival Market—Disturbance—Intention—Injunction.

The plaintiff was the lessee of a market, granted in 1698 by Royal Charter, for weekly sales of horses and cattle, the grant and also the lease including the right to receive the market tolls; and weekly sales were regularly conducted at the market accordingly.

In 1902 the defendant, who was an auctioneer and had been in the habit of holding auction sales of horses and cattle at the weekly market, took a field near the market for the purpose of holding sales there of horses and cattle, and then advertised that an auction sale of Welsh ponies would be held by him there upon a particular market day. On that day, after concluding his usual sale of horses and cattle at the market, he induced several of the persons present to leave the market and accompany him to the sale in his field, and the sale then took place.

In an action brought by the plaintiff against the defendant for an injunction, the defendant disclaimed any intention of setting up a rival market, and excused himself by saying that the market was for various reasons an unsuitable place for the sale of the ponies, which were wild and unbroken :—

Held (reversing the judgment of Kekewich J.), that the defendant's acts constituted such a disturbance of the plaintiff's market and invasion of his market rights as might be restrained by injunction, the question of intention being immaterial.

Goldsmid v. *Great Eastern Ry. Co.*, (1883) 25 Ch. D. 511, and *Mosley* v. *Walker*, (1827) 7 B. & C. 40; 31 R. R. 146, considered.

By a Royal Charter of King William III., dated November 11, 1698, there was granted to Francis Merrick and his heirs free and lawful power, licence and authority to hold upon certain lands of the said F. Merrick in Southall, Middlesex, a market in or upon every Wednesday for ever, and also two fairs or marts yearly for ever, to buy and sell horses and all manner of other beasts : one of the aforesaid fairs to be held in or upon Wednesday in every Easter week for ever, and the other to be held in or upon the second Wednesday in October for ever, together with the court of pie poudre and all liberties, free customs, powers, customs, tolls, stallage, piccage, and other commodities to such market, fairs and marts and court

of pie poudre respectively appertaining or belonging. Under an indenture dated March 24, 1902, and made between the Earl of Jersey (in whom the grant of the market had then become vested) of the one part, and the plaintiff, George John Wilcox, of the other part, the plaintiff was possessed for the term of one year from March 25, 1902, and so on from year to year until the demise should be determined by notice as therein mentioned, of all that the said market granted as aforesaid, with the liberties, &c., thereto appertaining or belonging, and the farmhouse and lands known as Southall Market and farm.

The defendant, Richard John Steel, was an agricultural valuer and auctioneer at Southall, and had for some years past—it was said for twenty years—been in the habit of conducting at Southall Market, on the market day, weekly auction sales of horses and all sorts of cattle, live and dead stock.

The plaintiff, on or shortly before becoming tenant of the market, took out an auctioneer's licence and warned the defendant that he, the plaintiff, intended in future to conduct the auction sales in the market himself, and objected to any further auction sales being conducted there by the defendant. Thereupon the defendant acquired a grass field adjoining the North Road, Southall, about 300 yards from the entrance to the market, and early in August, 1902, advertised in the local papers and also by posters in the market-place and neighbourhood not only his usual weekly sale at the market, but also that he intended to hold a sale by auction of fifty horses, cobs, ponies, and colts on Wednesday, August 20, 1902, in the field so acquired by him and referred to in the advertisements and posters as his "auction mart." On the sale day, August 20, the defendant, after concluding a sale of horses and cattle at the market, induced several dealers and others present to accompany him to his advertised sale in his field, and the sale then took place there accordingly. The plaintiff complained that this was a "disturbance" of his market, and that he was thereby "prevented from enjoying his market and taking the tolls and commodities thereof in so ample and beneficial a manner as he ought to and otherwise would have done," and

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that he had consequently sustained considerable damage. Accordingly, on August 14, 1902, he issued the writ in this action claiming a declaration that the establishment by the defendant of a market for the sale of horses and cattle upon his, the defendant's, premises constituted a disturbance and invasion of the plaintiff's market and market rights: an injunction restraining the defendant from establishing or holding a market for the sale of horses or cattle at Southall, and from using or permitting to be used any portion of his said premises in any such manner as to interfere with or prejudicially affect the plaintiff's market rights or to disturb his market: also an injunction to restrain the defendant from advertising any portion of his said premises, or any other premises, as a market for the sale of horses or cattle, or as a place used or to be used in any such manner as to interfere with or prejudicially affect the plaintiff's said rights: and damages, or, alternatively, an account of profits. In his statement of defence the defendant alleged that his sale on August 20, 1902, was a sale of about fifty wild and unbroken Welsh cobs, ponies, and colts consigned from Wales by a breeder to the defendant personally, and not to the market, for sale, and as a matter of convenience detrained at Southall Railway Station on the Great Western Railway and sold by the defendant on a market day after his attendance at the market: that the defendant had held at Southall for some time past, without any objection on the part of the plaintiff's predecessors, a similar sale once every year in or about the month of August, when breeders thinned their stocks before the coming winter: that such a sale as that held on August 20, 1902, never had been, and as a matter of fact could not, owing to the nature of the stock sold and the want of suitable requirements, be conducted in the market, and that such a sale was no disturbance of the plaintiff's market: that he, the defendant, had acquired his premises for the purpose of the annual sale of wild and unbroken horses, cobs, ponies, and colts, and not for the purpose of setting up a rival market or disturbing the plaintiff's market, or of holding sales on market days of horses or cattle. The defendant denied that he had in any way disturbed the plaintiff's market or prevented his enjoyment of

his market rights, or that the plaintiff had sustained any damage. The defendant then counter-claimed a declaration that the plaintiff was not entitled to prevent him from conducting auction sales himself in the market, he, the defendant, paying all proper market dues: also a declaration that the plaintiff was not entitled to levy—as the defendant alleged the plaintiff had done—tolls on live stock other than horses, cattle, or on dead stock: and damages, and repayment of tolls paid by the defendant to the plaintiff in respect of live or dead stock, not being horses or cattle.

In his reply the plaintiff alleged that if he ever claimed or received from the defendant payment of tolls in respect of live or dead stock, not being horses or cattle (which he in fact denied), such tolls were in the nature of stallage or pennage for the exclusive occupation by the defendant of part of the soil of the market-place, and were paid by agreement made orally at the time, or by implied agreement, or by the custom of the market. And in defence to the counter-claim the plaintiff submitted that it disclosed no cause of action: he denied having warned the defendant, or having objected to auction sales being conducted in the market by the defendant himself, or having claimed or received from the defendant payment of tolls on live or dead stock, not being horses or cattle, brought to the market: and the plaintiff further denied that the defendant had suffered any such damage as alleged in his counter-claim.

The action was tried before Kekewich J. in March, 1902.

The plaintiff's account, as given in the witness-box, of the occurrences on the day in question, Wednesday, August 20, 1902, was that on that day the defendant sold some horses in the market as usual, the sale commencing at 12 o'clock: that when he had concluded his sale he addressed those present, saying he had a fine lot of ponies on his field in the North Road, and that he was going to sell them as advertised, and he then invited those present to come over to the field with him: that he then went off to the field and "the crowd" went with him. The plaintiff further deposed that he himself had a large available space of grass-land close to the market and suitable for the sale of the ponies. He admitted that, before he became

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tenant of the market, he wrote to the defendant giving him notice of his intention to conduct auction sales there himself, and that on March 22, 1902, four days before the first auction sale during his tenancy, he wrote to the defendant that if he, the defendant, sold by auction without his, the plaintiff's, consent he would do so at his own risk; also that he, the plaintiff, posted up notices round the defendant's place at the market that "All lots in this part of the market will be sold by auction by Mr. Wilcox."

The evidence of the defendant was to the effect that in 1898 and 1900 he had held in Southall Market auction sales of consignments of horses, cobs, ponies, and colts, similar to the consignment sold by him in his field on the day in question: that the animals he had sold at the market in 1898 and 1900 consisted principally of unbroken Welsh ponies: that in 1900 the then lessee of the market requested him not to hold any more sales of ponies of that class on account of the damage done by them to the fences of the market, for the repairs to which the defendant had himself to pay, and that consequently, in 1901, the defendant sold his consignment of ponies off the market and in a neighbouring field; also that the market itself was an unsuitable place for a sale of unbroken ponies, by reason of the market being covered partly with asphalt, partly with bricks, and partly with gravel, so that, through the hardness and roughness of the ground, the ponies' feet, which were unshod, were injured, which led to the owners of the ponies objecting to their being sold there at all. The defendant's account of the occurrences on the day in question agreed in substance with that given by the plaintiff. He further deposed that he received a letter from the plaintiff dated March 22, 1902, stating that if he, the defendant, sold by auction at the market without his, the plaintiff's, consent, he, the defendant, would do so at his own risk: that on Wednesday, March 26, 1902, the first day on which the plaintiff sold in the market during the plaintiff's tenancy, he, the defendant, went into the market to conduct his auction sales at his usual place, when the plaintiff came up to him and said that he, the plaintiff, had "reserved that part of the market entirely for my own use";

whereupon the defendant disputed the plaintiff's right to make any such reservation, and maintained that he had a right to conduct a sale himself on payment of the usual tolls. The plaintiff, however, refused to admit the defendant's right to conduct a sale, and actually himself sold three horses which had been consigned to the defendant by old customers of his for sale. Subsequently, however, the plaintiff ceased to assert his claim to conduct auction sales in the market by himself, and after that day the defendant sold by auction at the market without any interruption, and alone.

He admitted in cross-examination that he selected a Wednesday for his sale of Welsh ponies at his field in North Road because it was a market day, though the sales were fixed after market hours; and he also admitted that he never told the plaintiff that he was going to hold the sale in the field, or complained to him that the market was unsuitable for the sale of the ponies, or asked him to provide some other place for the purpose.

In delivering judgment, Kekewich J. held that although, in a technical sense, there had been an invasion of the plaintiff's market, yet, upon the authorities, and having regard to the fact that the consignees of the ponies would, as the evidence shewed, never have consigned them to the defendant for sale at all if he had proposed to sell them in the market and not in his field, there had not been in fact, in the circumstances, an invasion of the market entitling the plaintiff to an injunction or damages. His Lordship also held that no motive could be attributed to the defendant for disturbing the market, his self-interest being clearly to appreciate and not depreciate the market, where he would have preferred selling the ponies, could he have done so. Upon the question of costs, his Lordship held that the plaintiff had been wrong in the first instance in insisting that the defendant should not sell in the market at all, and also in exacting tolls for such commodities as were not tollable, and that the defendant must have the whole costs of the action. His Lordship accordingly dismissed the action with costs, and, upon the counter-claim, made a declaration that the plaintiff was not entitled to prevent the defendant

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from conducting auction sales in Southall Market, the defendant paying all proper market dues for tolls, stallage, and other matters; that the plaintiff was not entitled to levy tolls on any other things than horses and cattle, and that the defendant was not entitled to bring upon the market any other things than horses and cattle; and the plaintiff was ordered to pay the defendant's costs of the counter-claim.

The plaintiff appealed against so much of the judgment as dismissed the action with costs.

The appeal was heard on December 2 and 3, 1903.

Warrington, K.C., and *E. Clayton*, for the plaintiff. The acts of the defendant clearly constituted an infringement of the plaintiff's market by setting up a rival market: *Dorchester Corporation* v. *Ensor*. (1) That case shews, first, that selling by auction marketable goods of other people in a field in the neighbourhood of an old market is setting up a rival market, which may or may not be a disturbance; secondly, that doing so on market day is a disturbance by intendment of law.

[VAUGHAN WILLIAMS L.J. Channell B. was there quoting from a note to *Yard* v. *Ford*. (2) It seems to me to be a question of fact and not of intendment of law: *Macclesfield Corporation* v. *Chapman*. (3)

ROMER L.J. The opinions of the judges on the *Islington Market Bill* (4) shew that the holding of a new market at the same times within the common law limits of the old market is primâ facie a disturbance. It is a primâ facie presumption only.]

This case falls within the principle of *Bridgland* v. *Shapter*. (5) The defendant justifies his conduct on two grounds. First, he says that the plaintiff threatened to exclude him from selling in the market. Secondly, he sets up want of accommodation. As to the first point, the threats had long since been discontinued, and the defendant had been selling in the market without let or hindrance from the plaintiff for several months

(1) (1869) L. R. 4 Ex. 335, 343.
(2) (1670) 2 Saund. 172; 2 Wms. Saund. 500; 1 Lev. 296.
(3) (1843) 12 M. & W. 18.
(4) (1835) 12 M. & W. 20, n.
(5) (1839) 5 M. & W. 375; 52 R. R. 755.

before the acts complained of in this action. As to the second point, want of accommodation, even if it were proved, which we deny, is no justification for setting up a rival market.

P. O. Lawrence, K.C., and *T. Ribton*, for the defendant. In previous years there had been sales of these ponies in the market, but the sales there were so dangerous that the then owner of the market prohibited any further sale of these ponies in the market; and also the consignors of the ponies complained to the defendant of the unsuitableness of the market for such sales. We admit that the defendant sold at the market on the day on which the disturbance is complained of, but he waited until the market was over before selling his ponies.

[VAUGHAN WILLIAMS L.J. The mere fact of selling near the market of itself does not give a cause of action. The Court must find as a fact that the defendant is getting the benefit of the market and evading the tolls: *Brecon Corporation* v. *Edwards*. (1) But primâ facie, to sell near the market on a market day is an infringement.]

This sale was not for the purpose of evading the tolls. The defendant shewed his bona fides by having sold similar consignments of ponies in the market until he was forbidden to do so. There is no case in which an isolated sale has been held to be an infringement.

[ROMER L.J. This is not a case of an isolated sale. It is a case of an auctioneer of the place where the market is held selling the goods of others close by. That is setting up a rival market.]

The defendant is willing to undertake not to sell ponies in future except in the market.

[They also referred to *Great Eastern Ry. Co.* v. *Goldsmid*. (2)]

As pointed out by Lindley L.J. in *Goldsmid* v. *Great Eastern Ry. Co.* (3)—which is the only case in which the question, What is a disturbance of a market? has been fully discussed—"There is plenty of authority to shew that a man may disturb a market without pretending to have got a market himself in

(1) (1862) 1 H. & C. 51; 31 L. J. (Ex.) 368.

(2) (1884) 9 App. Cas. 927.

(3) 25 Ch. D. 511, 548.

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the sense of having got a franchise." That case also shews that want of convenient room is a good defence to an action for selling outside an old market. (1)

It would be going beyond any of the cases to say that what the defendant has done is a disturbance of the plaintiff's market. Most of the authorities are clear that, to justify an injunction, it must be shewn that the defendant is intending to commit a continuous disturbance, as in *Goldsmid* v. *Great Eastern Ry. Co.* (2) In *Dorchester Corporation* v. *Ensor* (3) there was a fortnightly sale, and a clear intention on the part of the defendant to set up a rival market, for he regularly advertised his intention of holding fortnightly auction sales. *Bridgland* v. *Shapter* (4) was the case of "a fraud of the market" by a person taking the benefit of the market without paying the toll; but this is not a case of attempting to evade the market tolls.

It is, moreover, an important fact in this case that the plaintiff himself threatened to prevent the defendant from selling in the market.

[ROMER L.J. That is an important point on the question of costs.]

E. Clayton, in reply.

VAUGHAN WILLIAMS L.J. I have no doubt that the franchise of market, when it was originally established, was a very useful and beneficial thing to the public; and the numerous decisions found in the note to *Yard* v. *Ford* (5) were obviously decisions which were given in the earlier times when markets were of very great benefit. That time has gone by, while the tendency of the authorities since has been to limit rather than to extend the law of market.

Now, here the question is whether, upon the facts proved, there has been a disturbance of the market. Upon that question I have arrived at a conclusion different to that of Kekewich J. In my judgment the facts do establish a dis-

(1) 25 Ch. D. 555–6.

(2) 25 Ch. D. 511; 9 App. Cas. 927.

(3) L. R. 4 Ex. 335, 341.

(4) 5 M. & W. 375, 382; 52 R. R. 755.

(5) 2 Saund. 172; 2 Wms. Saund. 500; 1 Lev. 296.

turbance of the market. Now I agree with the learned judge that one has to consider in such cases partly what the intention of the defendant in doing the act complained of was. That is plain from the opinion of the judges of the Court of Exchequer in 1862 in *Brecon Corporation* v. *Edwards* (1); but, in my judgment, this particular case does not depend really on motives or intention at all. Sometimes a disturbance of a market consists merely of a sale outside the market. That was the nature of the sale in *Brecon Corporation* v. *Edwards*. (1) There the judges, particularly Bramwell and Wilde BB., pointed out that in the case there complained of, if the sales outside the market shewed an intention to evade the market, or payment of the tolls upon sales in the market, that would be of the very greatest importance. But that is not the case here. What the defendant did here was not merely to sell outside the market; what he did was to establish on this market day a new market rivalling the old market. When once you arrive at the conclusion of a rival market being established on this market day and taking advantage of the concourse of people coming to the lawful market, it appears to me that the question of intention is no longer relevant or important. If in truth and in fact you are setting up a rival market, and setting it up on a market day, and taking advantage of the concourse of people at the lawful market, in my opinion you are clearly evading the rights of the grantee of the market, and are really taking advantage of his market, and it is quite immaterial that you are not really intending to do so.

Having arrived at that conclusion, I think we ought here to give effect to it by our order; but I do not think we need give effect to our conclusion by granting an injunction. In my judgment, this is not a case in which we ought immediately to grant an injunction. One cannot forget in this case that it was the conduct of the plaintiff, the lessee of the market, which really provoked to a large extent that which was done by the defendant; and in these circumstances it appears to me that the justice of the case will really be met if a declaration is made to the effect that the conduct of the defendant was

(1) 1 H. & C. 51; 31 L. J. (Ex.) 368.

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unlawful in selling on this occasion in the manner he did, and constituted a disturbance of the plaintiff's market; and we can give the plaintiff liberty to apply hereafter if the defendant should repeat this offence or seek in any way to disturb the plaintiff's rights. One reason why, in my opinion, this course is the right course to pursue is that there is no reason to fear that the defendant is likely to repeat the wrongful acts complained of.

The learned judge held, upon the evidence, that the defendant had no real intention of invading the plaintiff's market, and I should really infer from the facts of the case that that was so; but still he is not entitled to set up a market in rivalry to the plaintiff's market. If he does so, the remedy is in the plaintiff's hands by liberty being given him to apply for an injunction.

Now, with regard to the costs, in my judgment, this is not a case in which the plaintiff should be entitled to the whole of the costs. This appeal was necessary, and therefore, as the appellant has succeeded upon it, he ought to have the costs of the appeal; but each party must pay his own costs in the Court below.

ROMER L.J. In this case there has been a disturbance of the plaintiff's franchise. Upon the special facts of this case I come to the conclusion that that was so. In all these cases you must look at the facts to see whether what is done does or does not amount to a disturbance.

In the present case the facts are shortly these. The defendant is not in the position of an ordinary member of the public in doing what he has done. He is not selling his own goods, but he is an auctioneer and is selling horses at a commission, in the usual way at public auctions, upon certain ground of his own which he has close to the market—so close in fact that the public attending the market could walk across. He did that upon a market day, and he had advertised that he would hold sales upon that day both in the market and upon his own ground.

In my opinion, what he was doing was establishing a rival market on the market day, and that was a disturbance of the

plaintiff's market. In the present case there is no question of pecuniary damage; the only question is whether the act of which the defendant has been guilty amounts in fact to a disturbance of the market, and that is the question which will arise whenever the act is repeated. We have decided that the defendant's present act is a disturbance of the market; but, as there seems to be no probability, under the circumstances, that it will be repeated and the defendant has, by his counsel, very properly offered to give an undertaking, we do not think the case is one for an immediate injunction. Therefore the order will be to the effect my Lord has intimated, and the plaintiff will have liberty to apply if necessary.

STIRLING L.J. I am of the same opinion. The defendant advertised in the newspapers and by posters that he would sell, upon August 20, 1902, at one o'clock, at his "auction mart" in the North Road, Southall, fifty Welsh horses, cobs, ponies, and colts. Then, upon August 14, the writ in this action was issued claiming an injunction, but an interim injunction was not applied for. Upon August 20 the defendant conducted his ordinary business in the plaintiff's market, and towards the close of the market he invited a number of persons present to come to the place where he was about to sell the Welsh horses. Those persons did accompany him, and he sold some horses on that day, August 20. The question is whether this was a disturbance of the plaintiff's market. With regard to the nature of the rights possessed by the grantee of a market, it is sufficient to adopt what was said by Lindley L.J. in *Goldsmid* v. *Great Eastern Ry. Co.* (1): "The authorities shew that the grantee of a market has some exclusive rights, and those exclusive rights, without attempting to define them positively and negatively, include an exclusive right of inviting the public to come and buy and sell in the place where the franchise has authorized the market to be held." Then he goes on to shew, upon the authorities, that a man may disturb a market without pretending to have got a market himself in the sense of having got a franchise.

(1) 25 Ch. D. 511, 548.

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Now, it appears to me that the advertisements and posters issued by the defendant constituted in themselves strong evidence of an intention on his part to invade the plaintiff's rights by selling horses, which were the subject-matter of the market franchise, upon a market day, and within the market hours, at a place in the immediate neighbourhood of the market; and it also appears to me that what was done by the defendant upon August 20, in inviting people to come to the place where he was about to sell these horses, was an actual invasion of the plaintiff's rights and an infringement of his monopoly. The defendant took the benefit of the plaintiff's market by addressing the people assembled there and taking some of them away. That, in my opinion, was a plain invasion of the plaintiff's rights.

But it is said that there are extenuating circumstances. Besides the horses which the defendant sold on August 20, there had been another consignment of horses which he had attempted to sell on another occasion when the market was in the hands of another lessee, and these horses broke loose, doing damage to the fences of the market and injuring themselves through the roughness of the ground. But that took place in the time of a former lessee, and did not entitle the defendant to sell as against the present lessee. If such a thing were allowed, the privileges of the market would soon disappear.

Then it was said that the accommodation at the market was insufficient. It was said that part of the market was covered with asphalt, part with bricks, and part with gravel, and that the ponies, not being shod, were liable to be hurt; but in the circumstances of the present case that was not a sufficient ground for the defendant's conduct.

As to this point, I refer to what was said by Lord Tenterden C.J. in *Mosley* v. *Walker* (1): "If, indeed, it could have been proved that any complaint or remonstrance had been made to the lord on the subject, as he has the power to hold the market in any part of Manchester, he being the lord of the manor and owner of the soil; and that after complaint and remonstrance on the part of persons frequenting the market,

(1) 7 B. & C. 40, 53; 31 R. R. 146, 153.

he had persisted to hold the market in this place when he might have holden it elsewhere, there might have been some foundation for the argument addressed to us on the part of the defendant, but in the absence of any such proof, I think that the Court ought to maintain this ancient right."

And in *Goldsmid* v. *Great Eastern Ry. Co.* (1) Fry L.J., in dealing with the authorities, sums them up by saying (2): "I think, therefore, that the objection of want of sufficient space in the market lies in the mouth of the person who has himself experienced that insufficiency, and has been unable to sell when he has wished so to do, but that it does not lie in the mouth of another person. I think that if A. has been turned back from a market because there is no room, he can defend himself; but that the turning back of A. does not justify B. in selling elsewhere than in the market."

Now, the evidence stands in this way. The plaintiff said he had some land in the immediate neighbourhood suitable for the ponies, and the defendant in cross-examination said he had made no complaint to the plaintiff about the condition of the market or asked him to provide a place suitable for the sale of these ponies. It appears to me that for the reasons I have mentioned that excuse fails.

Therefore I agree that the appeal should be allowed, and that an order should be made to the effect indicated by my learned brethren.

[Their Lordships accordingly made an order declaring that the acts of the defendant on August 20, 1902, complained of constituted a disturbance of the plaintiff's market. Liberty to the plaintiff to apply for an injunction in case of any repetition by the defendant of wrongful acts. The plaintiff to have the costs of the appeal. Each party to pay his own costs of the action in the Court below.]

Solicitors: *Ashurst, Morris, Crisp & Co.; Woodbridge & Sons.*

(1) 25 Ch. D. 511. (2) 25 Ch. D. 555.

G. I. F. C.

C. A.
1903
Dec. 19.

In re SAFETY EXPLOSIVES, LIMITED.

[00204 of 1902.]

Company — Winding-up — Creditor — Proof of Debt — Amendment — Secured Creditor — Omission to value Security — Vote in respect of whole Debt — "Inadvertence" — Solicitor — Lien on Client's Documents — Waiver — Companies Act, 1890 (53 & 54 *Vict. c.* 63), *Sched. I., clause* 8.

Solicitors, who had a lien for costs upon title-deeds of a company which were in their possession, proved their debt in the winding-up of the company, stating in the proof that they held no security for the debt, and they voted at a meeting of creditors in respect of the whole debt.

The solicitors afterwards acted for the liquidator in completing the sale of the company's property, and on completion they received the purchase-money and handed over the title-deeds to the purchaser, without any express bargain with the liquidator that their lien should not be prejudiced. They claimed to retain their debt out of the purchase-money, and applied for liberty to amend their proof by stating in it their security and the estimated value of it, or, in the alternative, to withdraw their proof and rely on their security for payment.

One of the solicitors deposed that the form of proof was filled up by a clerk who was ignorant of the existence of the lien, and this was confirmed by the clerk. The solicitor said that when the proof was put before him by the clerk he asked whether it was in order, and, on being assured by the clerk that it was, he swore the proof. It entirely escaped his attention that the proof stated that his firm held no security for the debt. Neither he nor his partner had any intention of surrendering the security, and they were not aware until some months afterwards that the proof made it appear that they did not hold security. The deponent also said that at the commencement of the liquidation a loss to the creditors of the company was not anticipated, for the statement of affairs shewed a surplus after paying the creditors, and the official receiver stated that the assets would be more than sufficient to pay the creditors in full. The assets ultimately proved to be deficient:—

Held, that, under the circumstances, leave ought not to be given to amend or withdraw the proof.

Decision of Buckley J. reversed.

Per Vaughan Williams L.J.: The definition of "inadvertence" given in *Ex parte Clarke*, (1892) 67 L. T. 232, adopted. (1)

The solicitors had not discharged the onus which lay on them of proving

(1) 67 L. T. at p. 233. "In my opinion the meaning of the rule is, that the creditor who has voted and has omitted to value his security ought always to be allowed to withdraw his proof and to be relieved from being deemed to have surrendered his security unless he has

inadvertence on their part. But, even if they had discharged that onus, yet they had lost their lien by handing over the deeds to the purchaser without calling the attention of the liquidator to the lien and asking whether he would consent to their retaining the benefit of it.

Stirling L.J. would not say that the omission to value the security did not arise from "inadvertence," though he thought the evidence very unsatisfactory.

But he rested his judgment on this, that the granting of leave to amend or withdraw a proof was not a matter of right, but was subject to the control of the Court, and leave ought not to be granted in a case in which, as here, the position of all parties, and especially that of the liquidator, had been altered since the proof was made.

APPEAL by the liquidator of the above company against an order made by Buckley J. in the winding-up of the company giving liberty to Messrs. Cox & Lafone, who had acted as solicitors of the company before the winding-up, at their own expense to amend their proof of debt by inserting therein the particulars of a security on the property of the company, which the solicitors held at the date of the commencement of the winding-up and at the date of the proof, and the value at which they estimated their security, or, in the alternative, that the solicitors should be at liberty to withdraw their proof and rely on their security for the payment of the debt due to them by the company.

The security of Messrs. Cox & Lafone consisted of their lien, as the solicitors of the company, upon the title-deeds of the freehold and leasehold properties of the company, some letters patent of and documents conferring patent rights on the company, and a policy of insurance which had been assigned to the company, which deeds, letters patent, and documents were in the possession of the solicitors.

On August 5, 1902, an order was made for the compulsory winding-up of the company. At the commencement of the winding-up a considerable sum was due by the company to Cox & Lafone, as their solicitors, but the bills of costs had not been made out. Cox & Lafone had then in their possession

elected really to abandon his security; that is, unless he has omitted to do that which he did omit, deliberately and on purpose. If it has been done accidentally he ought, on such terms as the Court may think fit to impose, to be relieved from the loss of his security."

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the above-mentioned title-deeds and other documents of the company.

A proof of the debt claimed by the firm as due to them by the company, namely, 809*l.* 12*s.* 5*d.*, was sworn by Gordon Cox, one of the partners, and in this proof it was stated that they held no security for their debt. They afterwards, by one of their clerks as their proxy, voted at a meeting of creditors as unsecured creditors for the whole of the above amount.

On December 8, 1902, the official liquidator sold by tender for 3600*l.* the whole of the company's property, which consisted of freeholds and leaseholds, patent rights, the policy of insurance, machinery, plant, and stock-in-trade. The purchaser paid a deposit of 720*l.* Messrs. Cox & Lafone were employed by the liquidator as his solicitors in the completion of the sale. The sale was completed on February 4, 1903, when the whole of the company's property was conveyed or assigned to the purchaser, to whom the solicitors handed over the title-deeds and other documents on which they had a lien. There was no express bargain with the liquidator that their right of lien should be unaffected by the handing over of the deeds, nor did they inform him that they intended to claim the same right of payment as if the deeds had remained in their possession. On the completion of the sale the balance of the purchase-money was paid to the solicitors. They claimed to retain out of the amount the sum of 824*l.* 12*s.* 9*d.*, which was made up of the above sum of 809*l.* 12*s.* 5*d.* and 15*l.* 0*s.* 4*d.*, costs due to them from the liquidator in the winding-up, and they sent to the liquidator a cheque for the balance after deducting the 824*l.* 12*s.* 9*d.*

The liquidator disputed their right to make this retainer, and insisted that they had waived their lien, and on May 21, 1903, the solicitors took out the summons on which the above order was made. In support of the summons Gordon Cox made an affidavit in which he said that when a form of proof of debt was sent to him by the liquidator he handed it to Mr. H. A. Moore, one of his clerks, with instructions to do what was necessary, but did not inform him that the firm had the title-deeds and other documents of the company in their

possession. Moore afterwards placed before him the form of proof filled in by him, and also a general form of proxy. He inquired of Moore whether the proof and proxy were in order, and, on being assured by him that they were, he swore the proof and signed the proxy, and gave them to Moore. "In so doing I had the most perfect confidence that the documents had been correctly and carefully prepared in every detail. No question of security for the said debt was mentioned to me by Moore, and it entirely escaped my attention when I signed and swore the said proof that as prepared it purported to state that my firm held no security for the debt due to my firm by the company. Neither I nor my partner ever had the slightest intention of surrendering or abandoning the lien to which my firm was entitled on the company's deeds and documents in my firm's possession. We were not aware until some months afterwards that the said proof had been sworn in such terms as to make it appear that we did not hold the said security, and, as appears from the correspondence hereinafter referred to, my firm continued to act in all respects on the footing and assumption that it still held the said lien and security."

Among the correspondence there referred to was a letter dated January 2, 1903, from the liquidator to Cox & Lafone, in which, referring to the policy, he stated that the insurance company had given him notice that a bonus was due on it and that the company required the production of some documents of title, and he added: "Will you please let me have the necessary papers, so that I may pass them on to the insurance company." To this letter Cox & Lafone on January 5, 1903, replied: "We have now looked up the documents mentioned in your letter of the 2nd inst. Having regard to the fact that we look to our lien on those and the other documents as security for our debt, we suggest that the better plan will be for us to register the two assignments with" the insurance company.

Moore made an affidavit in which he said that, at the time when he prepared the proof, he was quite unaware that his principals held in their possession the title-deeds and other documents of the company, and that they were entitled to a

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lien thereon. He assumed that the claim of his principals was an unsecured claim for the amount due on bills of costs and cash account. In other respects he confirmed the account given by Gordon Cox.

In a further affidavit Gordon Cox said that "at the commencement of the liquidation a loss to creditors was not anticipated. The statement of affairs shewed a surplus after paying creditors, and the official receiver stated at the meetings of creditors and contributories that the company's assets would be more than sufficient for payment of the creditors in full."

In fact, when the assets were realized they proved to be insufficient.

Buckley J. held that under Sched. I., clause 8, of the Companies (Winding-up) Act, 1890 (1), the solicitors were entitled to the order for which they asked.

The liquidator appealed.

Herbert Reed, K.C., and *E. O. Simpson*, for the liquidator. It is submitted that the order of Buckley J. is erroneous, (1.) because it is illusory and cannot benefit the solicitors. (2.) Primâ facie a solicitor who parts with his client's documents on which he has a lien loses his lien. The onus is on the solicitor to shew that he retains the benefit of the lien, and this has not been shewn in the present case. When the solicitors parted with the deeds they were acting consistently with their proof. It has not been shewn that the omission to state and value the security in the proof arose from "inadvertence." Inadvertence is not the same thing as negligence. A creditor who is asking for an indulgence of this kind ought at any rate to tell the Court distinctly what the

(1) Clause 8: "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

This clause is expressed in the same terms as clause 10 of Sched. I. to the Bankruptcy Act, 1883, with regard to a secured creditor in bankruptcy.

inadvertence was. Moreover, the order is erroneous because it does not exclude the right of the solicitors to hold the money which they have retained, and thus throws on the liquidator the onus of proving that it was not a security for the debt due to them. If, however, the solicitors are allowed to amend or withdraw their proof, the order should be made without prejudice to the rights of the other creditors: *In re Henry Lister & Co.* (1); *In re Newton.* (2)

Gore-Browne, K.C., and *Muir Mackenzie*, for the solicitors. The order merely gives leave to amend or withdraw the proof at the applicants' own expense.

[VAUGHAN WILLIAMS L.J. Has the liquidator altered his position in consequence of what the solicitors did? Primâ facie he did alter his position if when the deeds were given up there was no express bargain that the solicitors should retain the benefit of their lien.]

The solicitors claim a lien on the money in their hands by virtue of their lien upon the deeds which they handed over to the purchaser.

[STIRLING L.J. Their lien was on the parchments, not on the land.]

It must be admitted that there was no express bargain that they should retain the benefit of their lien. But the liquidator had express notice of the lien, and this shews that he could not have altered his position in reliance upon there being no lien.

As regards clause 8, if the Court is satisfied that the creditor acted through inadvertence the previous part of the clause does not apply.

[STIRLING L.J. If the solicitors had said to the liquidator, "We have a lien on the deeds, and you cannot complete the sale without our consent," the position would have been very different from what it is.]

The liquidator, if he had been told that, would still have acted just as he did act. The most he could have done would have been to sell subject to a condition that the purchaser should not have any title-deeds.

(1) [1892] 2 Ch. 417, 420. (2) [1896] 2 Q. B. 403.

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[VAUGHAN WILLIAMS L.J. referred to *In re Hawkes* (1) as shewing that when a solicitor has a lien as against a client on his documents, and after his death he accepts the position of solicitor to his representative, he cannot set up the lien as against the representative.]

The meaning of "inadvertence" in clause 10 of Sched. I. to the Bankruptcy Act, 1883, was explained by Vaughan Williams J. in *Ex parte Clarke*. (2) The definition there given applies to the present case. In *In re Piers* (3) the creditor had mentioned his security in his proof, though he had stated that it was worthless. The result of the evidence in the present case is that Cox did not bring his mind to bear on the subject; he never deliberately elected to surrender his security. If the Court is satisfied that there was "inadvertence" on his part, then there was no surrender of the security. If an amendment of the proof is allowed, that will not prejudice any question as to the lien.

VAUGHAN WILLIAMS L.J. In my judgment this appeal ought to be allowed. I think an order ought not to be made allowing these creditors to amend or withdraw their proof. I must not be understood as saying that they could not withdraw their proof for the purpose of correcting an inaccurate statement in it; I do not suppose the liquidator would have any objection to its being withdrawn with that object. But in my judgment they ought not now to be allowed to withdraw their proof for the purpose of relying on their lien. It is admitted that they wish to amend or withdraw their proof for the very purpose of justifying their claim to the 809*l.* by virtue of their lien, and it is also admitted that there was not any express bargain made between them and the liquidator that they should retain the benefit of their lien. What then have we to do in such a case as this? We have first to apply clause 8. [His Lordship read the clause, and continued:—]

I do not desire to depart in the slightest degree from what I said in *Ex parte Clarke* (2) as to what constitutes "inad-

(1) [1898] 2 Ch. 1, 16. (2) 67 L. T. 232, 233.
(3) [1898] 1 Q. B. 627.

vertence." I there mentioned amongst things which could not constitute "inadvertence" a case in which a creditor, balancing the advantages and disadvantages of stating and valuing his security, deliberately elects to prove for his whole debt. That is not exactly the present case. But, speaking for myself, I have been left by the affidavit of Mr. Cox in a state of great uncertainty as to the circumstances under which he failed to mention his security in his proof. [His Lordship read the statements in Cox's affidavit which are above quoted, and continued:—]

I can only say that it is quite consistent with the statement that he was unaware that the proof purported to state that his firm had no security for the debt, that he remembered at that moment the fact that his firm had the security. Now, if he remembered the fact that his firm had the security, he may well have been quite unaware of the statement in the proof that they had none, and yet have thought that it was not worth while to trouble about the security, because the company's assets were likely to yield 20*s.* in the pound for the creditors, and that if necessary there would be quite time enough to amend the proof afterwards by stating the security and its value. There is nothing in the affidavit which excludes the possibility of that state of mind on the part of Mr. Cox. And if that was his state of mind, it would not, I think, be true to say that he omitted to state the security by "inadvertence" within the meaning of clause 8. Buckley J. has arrived at the conclusion that the omission was by inadvertence, but his attention does not seem to have been called to the fact that the statements in the affidavit are open to the comment which I have made upon them. Moreover, the later affidavit made by Mr. Cox, although he does not mention the state of the company's assets as the reason for omitting to value the security, shews conclusively that this frame of mind continued down to the time of his swearing the proof—namely, that he continued to take the view that 20*s.* in the pound would be paid to the creditors. I do not think that he has satisfied the onus which was clearly on him of shewing that the omission was caused by inadvertence.

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But I will deal with the case upon the assumption that the omission was due to "inadvertence." If so, what is the state of things? Here are solicitors to whom a debt is due from their clients, the company, and they are relying upon a lien on documents of the company which arose during the time of their retainer by the company, not by the liquidator. In the course of the liquidation it became necessary to realize the company's assets, and Cox & Lafone were acting as solicitors for the liquidator in the matter of the realization. They put in a proof which negatived their having any lien for their debt, and allowed their client to invite tenders for the sale of the whole of the assets, including those portions of the property the title-deeds of which they held. They allowed their client to do that without in the slightest degree warning him that, when he came to realize that part of the property the title-deeds of which they held, there would be a difficulty in carrying out the contract in its entirety unless 20*s.* in the pound was paid to them in respect of their bill of costs. I can only say that such conduct on the part of the solicitor was perfectly consistent with the proof which he had put in on behalf of his firm—a proof which was of course within the knowledge of the liquidator. [His Lordship then read the letters of January 2 and January 5, 1903, and continued:—]

I agree that in that letter of January 5 there is an allegation by the solicitors of their lien, although the actual exercise of it is limited to the policy of insurance. The policy was in fact included in the property which was ultimately sold, although not apparently in terms. The letter did not in any way refer either to the proof or to the lien, as things which would in any way interfere with the carrying out of the contract. It has been suggested that in that state of things, and after the receipt of that letter, the liquidator could not have acted upon the assumption that the proof as put in was in accordance with the facts, and with the position taken up by Messrs. Cox & Lafone. I cannot agree. I can well conceive the liquidator receiving that letter without in the slightest degree realizing that such a lien was claimed by these gentlemen as would interfere with the carrying out of the contract for sale. It

seems to me that the solicitors were actuated all the way through by the confident expectation that 20*s.* in the pound would be paid to the creditors, and under those circumstances they did not call the attention of the liquidator to the fact that they were insisting upon a lien which would stand in the way of the completion of the sale.

Now the sale took place, and the deeds were handed over by the solicitors to the purchaser. Their obvious duty, if they meant to rely upon their lien, was, before they handed over the deeds to the purchaser, to call the attention of the liquidator to the lien, and ask him whether he would (notwithstanding the handing over of the deeds) consent to their retaining the benefit of the lien. But nothing of that sort took place. In that state of things the sale went through, and the deeds were handed over to the purchaser. The solicitors now come and ask for leave to amend or withdraw their proof. In my opinion that leave ought not to be given, because their object in amending the proof is to set up a state of things which is inconsistent with their own proof which was on the file at the time of the carrying through of the sale, and inconsistent also with their own action at the time of the sale.

The solicitors' counsel did not dispute that an amendment of a proof ought not to be allowed if the position of the parties has been altered since it was put upon the file, and while it continued there—if the liquidator has altered his position on the basis of the proof. But it is said that it is not sufficient to shew that the liquidator has acted in a manner which is consistent with the proof as it stood, but it must be shewn that he so acted because the proof was on the file. I do not agree with that. It seems to me that if one man allows a state of things to continue, and another acts in a way which can be justified if that state of things exists, but could not be justified unless it did exist, you ought not to allow the person who so acts to be prejudiced by altering the state of things which existed at the time when he so acted. It seems to me that it would be wrong to throw upon the liquidator the obligation of shewing that he did in fact rely upon the proof. Whether the proof was or was not actually present to his mind, he was

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dealing with the property on the basis that the solicitors had no lien. It is, I think, plain that the liquidator did deal with the property upon that basis. I think the whole conduct of the solicitors, apart from the letter of January 5, was such as to induce the liquidator to suppose that there was no lien enforceable by the solicitors which could stand in the way of the completion of the sale; and under these circumstances I think we ought not to allow the solicitors now to amend their proof.

In my opinion, therefore, this appeal should be allowed: (1.) On the ground that Mr. Cox has not satisfied the onus which lay upon him of shewing that the proof was sworn by inadvertence. There was no doubt inadvertence so far as Cox was not aware that the proof stated that there was no security; but I am not satisfied that he had not present to his mind the fact that his firm held the security. (2.) I am of opinion that the amendment ought not to be allowed in a case in which the liquidator has acted in a way which was consistent with the facts as mentioned in the proof, but which would be inconsistent with the existence of the lien. In my judgment, under the circumstances leave to amend ought not to be given, and the appeal should be allowed.

STIRLING L.J. I am of the same opinion. The first point to be considered is whether the Court is satisfied that the omission to state and value the security claimed by the solicitors took place by inadvertence. For the reasons which have been given by my learned brother, the evidence appears to me, as it does to him, very unsatisfactory. Still I am not prepared to say that inadvertence has not been made out, though I agree with my Lord's criticisms of the affidavit. But I prefer to rest my decision on the ground that the granting of leave to amend or to withdraw a proof is not a matter of right, but is subject to the control of the Court, and leave ought not to be given in a case in which in the interval between the carrying in of the proof and the application for leave to amend the position of all parties, and of the liquidator in particular, has been altered. [His Lordship gave a short summary of the facts, and continued:—]

In this state of things the solicitors had a lien on the documents belonging to the company for the debt due to them by the company. I cannot help thinking that there has been some misapprehension by the parties as to the nature of the solicitors' right. It seems to have been imagined that the lien on the documents gave the solicitors some charge or security upon the property to which the documents related. I need hardly say that that is not the law. The solicitors' lien simply entitled them to retain the documents in their hands until they should receive payment of what was due to them as solicitors.

That being so, the solicitors advised the liquidator with reference to the sale; and, as it seems to me, it was their duty to tell the liquidator plainly what rights they had in respect of the documents. They ought to have said to him, "You have to sell this property, but you must remember we cannot complete this sale without payment of our costs, and we will not part with the deeds unless and until we are paid all that is due to us from the company." Then the liquidator would have been in a position to consider what he should do, and it would have been a most important thing for him to consider how he should sell the property. The patents, for example, which I understand were in the possession of the solicitors, would undoubtedly affect the title to some of the assets of the company. The title to the leasehold property again would be affected by the lease. The fixed plant, the machinery, and the stock-in-trade would be entirely unaffected. A question of this kind has often arisen, not only in the administration of estates, but in the winding-up of companies; and then, usually, either some arrangement is made between the solicitor and the trustee or liquidator by which the deeds are parted with, or, if the parties are unable to come to an arrangement between themselves, the matter must be brought before the Court in some shape. In some cases it might be that the sale could go on practically without the title-deeds being produced, and the trustee or liquidator would simply get an order authorizing him to put the property up for sale, subject to a special condition relieving him from handing over to the purchaser the deeds to which

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he would otherwise be entitled. That is all. It sometimes happens that a sale is allowed to go on upon the terms of a certain amount of the purchase-money being set aside to meet the claim of the solicitor. But that is all a matter of arrangement between the parties themselves, or an arrangement made under the direction of the Court. It is admitted that no such arrangement was made in the present case. The whole of the company's property was put up for sale, both that to which the deeds related and that to which they did not. The sale took place and was completed, and the solicitors handed over the deeds to the purchaser without any condition, and in that way their lien came to an end. Having done that, they now seek to retain the amount for which they had a lien, and they ask the Court to assist them in making good their claim, and to allow them to amend or withdraw their proof.

It is impossible to undo what has been done, and in the circumstances I think it would not be right to permit the proof to be amended or withdrawn. The appeal must be allowed.

VAUGHAN WILLIAMS L.J. I omitted to say that I agree with Mr. Reed's argument that an order giving leave to amend or withdraw the proof would under the circumstances be illusory.

Solicitors: *Helder, Roberts & Co.; Cox & Lafone.*

W. L. C.

In re GEIPEL'S PATENT.

C. A. 1904 Jan. 23, 25; Feb. 8, 9.

Patent—Disclaimer — Revocation — Leave to amend — Conditions—Infringements prior to Amendment — Discretion — Form of Order — Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20 *—Costs — Taxed Bill — Successful Appeal from Part of Judgment — Apportionment.*

In a proceeding for revocation of a patent, the Court of Appeal will not review the exercise by a judge of the discretion given to him by s. 19 of the Patents, Designs, and Trade Marks Act, 1883, as to the terms and conditions of an order for revocation, where the judge has exercised his discretion with a full knowledge of all the circumstances of the case.

Appeal from Buckley J. as to form of order for revocation, [1903] 2 Ch. 715, dismissed.

Where the unsuccessful party at the trial of an action has been ordered to pay the costs of the successful party, and those costs have been actually taxed and paid, the Court of Appeal will, upon a successful appeal from part of the judgment, and without remitting the matter to the taxing master, itself examine the taxed bill and fix the proportion to be repaid to the successful appellant.

THIS patent case, reported (1), came before the Court of Appeal upon two appeals from the decisions of Buckley J., one being by the patentee against the decision that the claim in respect of the mode of user of the invention indicated by fig. 6 annexed to the complete specification was bad on the ground of disconformity with the provisional specification; and the other being an appeal by the petitioners against the limited form of the order for the revocation of the patent.

After hearing the patentee's appeal, their Lordships reserved judgment on that appeal.

The petitioners' appeal was then opened.

T. Terrell K.C., *Astbury, K.C.*, and *J. H. Gray*, for the petitioners, contended that the order should have been made in the more extended form sanctioned by the House of Lords in *Deeley* v. *Perkes* (2), with the addition of the words "or maintained" after the word "brought," so as to cover any pending action.

(1) [1903] 2 Ch. 715. (2) [1896] A. C. 496, 500.

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[They referred also, as in the Court below, to *In re Pitt's Patent* (1); *In re Allison's Patent* (2); Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 18, 19, 20.]

Bousfield, K.C., and *A. J. Walter*, for the patentee, contended that the Court ought not to interfere with the discretion of the learned judge, who had exercised it under s. 19 after a full consideration of the special circumstances of the case.

[They referred to *Re Hearson's Patent.* (3)]

Astbury, K.C., in reply.

VAUGHAN WILLIAMS L.J. We all agree that the judge has a discretion in the matter, and not merely a limited discretion as suggested. The judge knows as much about the case as we do, and he has exercised that discretion. I do not think we ought to review it.

Therefore, under these circumstances, I think it better to abstain from making any observations upon the arguments that have been brought forward at the bar, whether I agree with them, or whether I do not. I think this appeal ought to be disallowed, and with costs.

STIRLING L.J. I agree.

COZENS-HARDY L.J. I agree. It is not for me to say whether I should have exercised the discretion in the same way that the learned judge has; but I cannot say that, in having exercised it, he has gone so wrong that we ought to review it.

1904. Feb. 8. THE COURT (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.) delivered judgment, allowing the patentee's appeal with costs on the ground that, in their Lordships' opinion, there was no disconformity between the provisional and the complete specifications.

A. J. Walter, for the patentee, asked for the costs of the Court below, so far as they had been increased by this part of

(1) [1900] 1 Ch. 508. (2) (1900) 17 Rep. Pat. Cas. 298, 513.
(3) (1884) 1 Rep. Pat. Cas. 213.

the case. The costs in the Court below had been taxed and paid. They amounted to 660*l.*

VAUGHAN WILLIAMS L.J. We are of opinion that there ought to be an allocation of costs such as that which has been suggested. That being our opinion, we are ready, if the parties are willing that we should do so, to fix the proportion ourselves, which we have really ample materials for doing, and so save the parties the costs of further inquiry before the taxing master.

Counsel having assented to that course,

Their Lordships requested to see the bill, in order to ascertain what the proportions should be.

Feb. 9. Their Lordships having seen the bill,

VAUGHAN WILLIAMS L.J. The petitioners, to whom the taxed costs have been paid, must, in our opinion, return 125*l.* of the total sum of 660*l.*

T. Terrell, K.C., for the petitioners. Would it not be convenient to do this? My clients will have to pay the costs of the appeal; so if they add 125*l.* to those costs, that will meet the case.

VAUGHAN WILLIAMS L.J. Yes; that would produce the same result. Let the order be in that form.

Solicitor for petitioners: *F. E. Jones, for W. T. Hill, Manchester.*

Solicitors for patentee: *Faithfull & Owen.*

G. I. F. C.

KEKEWICH J.

1903

Nov. 24, 25, 30; *Dec.* 7.

NORTH AMERICAN LAND AND TIMBER COMPANY, LIMITED *v.* WATKINS.

[1901 N. 1128.]

Limitation, Statutes of—Principal and Agent — Moneys remitted to Agent for Special Purpose and not accounted for—Express Trust—Action for Account.

In 1882 the defendant went to the United States as the agent of the plaintiff company to buy timber lands for the company; but finding that the timber lands had been already acquired by third persons, the defendant in 1883 proposed to the company as an investment certain prairie lands of which he had secured the refusal. The company instructed the defendant to buy the lands, and from time to time in 1883 on his request remitted to him moneys for that purpose. The defendant purchased the lands and paid for them out of these moneys, and conveyed the lands to the company. In 1901 the company, having then for the first time discovered that the defendant had charged the company more than he had paid for the lands, brought an action to recover from the defendant the balance of the moneys remitted to him and not accounted for:—

Held, that, the moneys having been remitted by the company to the defendant as their agent for investment in a specified manner, the defendant was an express trustee for the company of those moneys, and that the Statute of Limitation was not a bar to the action.

Burdick v. *Garrick*, (1870) L. R. 5 Ch. 233, and *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, followed.

Watson v. *Woodman*, (1875) L. R. 20 Eq. 721, and *Friend* v. *Young*, [1897] 2 Ch. 421, explained and distinguished.

This action was brought by the North American Land and Timber Company, Limited, in the year 1901 to recover from the defendant certain moneys alleged to have been received by him in 1883 as trustee or agent for the company and not accounted for.

The company was registered on September 7, 1882, under the Companies Acts, 1862–1880, its principal objects being to purchase, develop, sell, and otherwise deal with land in the United States.

The defendant, who was a citizen of the United States, promoted the company for the purpose of its acquiring certain

timber lands in Texas and Louisiana, and he acted as the general manager of the company in America from the date of its formation till July, 1897, when he was dismissed. The defendant was to bear all expenses in America, and was to be remunerated for his services by the allotment of fully paid shares in the company; but he eventually waived any right to remuneration for services rendered prior to January 1, 1884. On September 14, 1882, he proceeded to the United States as the agent of the company to purchase the timber lands above referred to, and a sum of 40,000*l.* was placed to his credit at New York for this purpose. Soon after his arrival in the United States the defendant discovered that the timber lands in question, or the greater part of them, had already been bought up by third parties, and he communicated this fact to the company. In the meantime the defendant had discovered that there were some prairie lands to be sold in Louisiana, and he regarded these lands as a suitable investment for the company. Accordingly, in January, 1883, the defendant obtained the refusal of over a million acres of prairie land, and paid a certain sum out of his own moneys to the registrar (the land official), either by way of deposit or as a solatium, to secure his interest in this land. He then wrote to the company that he had secured over a million acres of land, not pine, and would guarantee to the company 800,000 acres at an average price of 40 cents per acre. After some further correspondence the company on March 14, 1883, cabled to the defendant, "Buy million acres; use 40,000*l.*"; and they confirmed this by a letter of the same date, in which they authorized him to buy at least 800,000 acres of prairie land. On April 14, 1883, the defendant received from the company a power of attorney dated March 8 authorizing him in general terms to buy lands and timber for the company. On May 12, 1883, the defendant wrote to the company asking for further remittances, and stating that he required a total of 120,000*l.* by June 10. On June 26, 1883, he informed the company that the exact acreage secured to the company was 787,345, and the exact cost $279,938.17. This made the average price about 35½ cents per acre. He then gave an account of the moneys which he had received from the

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company, which shewed a total of $267,100, leaving a balance due to the defendant of $12,838.17. These lands, and also some additional lands in the same region which the defendant subsequently acquired, were conveyed to the defendant in his own name; but by the direction of the company they were subsequently, by several deeds dated in 1883 and 1884, conveyed by the defendant to three persons nominated by the company as trustees for the company. The total area of the land so conveyed was stated by the plaintiff company to be 878,566.55 acres, and the total amount of money remitted by the company to the defendant 78,636*l.* 3*s.* 6*d.*, the last payment having been made on December 3, 1883. By their statement of claim the plaintiff company alleged that the defendant purchased these lands for them as their agent out of the moneys remitted to him for that purpose; that the amount charged to them by the defendant for the said lands and represented by him to have been paid therefor out of the moneys remitted to him by the plaintiff company for the purchase thereof was $388,113.88, whereas the sum actually paid by the defendant for the said lands was $239,547.76; that consequently the defendant, while acting as the agent of the plaintiff company, had converted to his own use $148,566.12, or, in the alternative, had made a secret profit of that amount out of the business entrusted to him by the plaintiff company. The delay in bringing the action the plaintiffs accounted for by the fact that they did not become aware that the defendant had made a profit out of these transactions until April, 1901.

The plaintiffs claimed to recover from the defendant, "as moneys had and received by the defendant to the plaintiff company's use, or as moneys received by the defendant as trustee for the plaintiffs and retained by him or converted to his own use, or as and by way of secret profits," the difference between the price paid by the defendant for the land and the amount charged by him to the plaintiffs, with interest at 5 per cent.; an account of all the moneys received by the defendant as trustee or agent of the plaintiff company in 1883 and 1884, and an order for payment of the balance found due upon the taking of the account with interest; and a declaration that

the plaintiff company under their articles of association were entitled to a lien on all shares of the company registered in the defendant's name.

The main defence to the action was that as to the portion of the million acres conveyed to the company the relation between the parties was not that of principal and agent, but of vendor and purchaser. The defendant alleged that save as to any lands purchased by him subsequent to the receipt of the power of attorney of March 8, 1883, the lands were purchased on his own behalf and not as agent, and that as to the lands purchased subsequently he made no profit; and, among other defences, he pleaded the Statutes of Limitation.

Upon an application by the plaintiffs for leave to administer interrogatories, the defendant admitted that, if the plaintiffs should establish at the trial that the defendant was their agent in respect of the purchases mentioned in the statement of claim, the plaintiffs would be entitled to an account, subject to the defence founded on the Statutes of Limitation and to certain other special defences which were not persisted in at the trial; and this admission was embodied in the order made on May 8, 1903, upon that application.

In the course of the argument his Lordship expressed his opinion, which he stated at greater length in his considered judgment, that the defendant purchased all the lands in question in this action as the agent of the plaintiff company. The arguments are reported only on the question whether the action was barred by the Statutes of Limitation.

Upjohn, K.C., *Gore-Browne, K.C.*, and *Newton Crane*, for the plaintiff company.

Warrington, K.C., and *Martelli*, for the defendant. There is here no express trust created, and the fiduciary relation existing between principal and agent is not such as to prevent the Statute of Limitations from running: *Friend* v. *Young* (1); *Watson* v. *Woodman*. (2) In *Burdick* v. *Garrick* (3) there was a direct trust created between the parties. In *Watson* v.

(1) [1897] 2 Ch. 421. (2) L. R. 20 Eq. 721.
(3) L. R. 5 Ch. 233.

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Woodman (1) Hall V.-C. distinguishes *Burdick* v. *Garrick* (2) on the ground that it was decided on the special nature of the deed; and Stirling J. adopts that distinction in *Friend* v. *Young*. (3)

[They also referred to *Banner* v. *Berridge* (4) and *Thorne* v. *Heard*. (5)]

Upjohn, K.C., in reply. The authorities draw a distinction between the case of a mere agent and the case of an agent who receives money from his principal on some special trust: *Sheldon* v. *Weldman* (6); *Burdick* v. *Garrick* (2); *Gray* v. *Bateman* (7); *Banner* v. *Berridge* (8); *In re Bell* (9); *In re Sharpe* (10); *Soar* v. *Ashwell*. (11)

These cases establish that an agent who receives money from his principal to be applied for a particular purpose is a trustee of the money for the principal. In *Friend* v. *Young* (3) Stirling J. was dealing with a case in which there was no obligation on the part of the agent to keep the money separate, and the case is distinguishable on that ground. In *Watson* v. *Woodman* (1) Hall V.-C. does not deal satisfactorily with the point now at issue. That case may possibly be distinguished from *Burdick* v. *Garrick* (2) and that class of cases on the ground that no direction was given as to how the money was to be dealt with before the receipt of the money on the client's behalf; and the same distinction applies to *In re Hindmarsh* (12), which is subject to the observations of Lord Hatherley in *Burdick* v *Garrick*. (2)

Here there was a plain trust on the part of the defendant to use the money of the plaintiffs in the purchase of lands to the best of his ability. The relief granted by the Trustee Act, 1888, s. 8, does not apply to this case, as this is money retained by the trustee or received by him and converted to his use.

Warrington, K.C., in reply on the new cases. The true distinction between *Friend* v. *Young* (3) and *Watson* v. *Wood-*

(1) L. R. 20 Eq. 721.
(2) L. R. 5 Ch. 233.
(3) [1897] 2 Ch. 421.
(4) (1881) 18 Ch. D. 254.
(5) [1894] 1 Ch. 599.
(6) (1663) 1 Ch. Cas. 26.
(7) (1872) 21 W. R. 137.
(8) 18 Ch. D. 265.
(9) (1886) 34 Ch. D. 462.
(10) [1892] 1 Ch. 154.
(11) [1893] 2 Q. B. 390.
(12) (1860) 1 Dr. & Sm. 129.

man (1) and the cases cited on behalf of the plaintiff company is this: If the purpose entrusted to the agent is one which exhausts the money in his hands, then he is an express trustee, and the operation of the statute is excluded; otherwise it is not. In *In re Sharpe* (2) Lindley L.J. points out that where the duty of the agent is to remit money in his hands to his principal, then the Statute of Limitations applies; and the reason is that in that case an action for money had and received by the defendant to the use of the plaintiff would lie. Although the common law did not in terms recognise trusts, yet it did recognise that money might be received by one person to the use of another. Stirling J. in *Friend* v. *Young* (3) said that the test was whether or not there was an express trust; and there is an express trust if the purpose for which the money in the hands of the agent is to be employed exhausts the whole of the money—if, in other words, there is nothing to which the action of money had and received can apply. In this case the allegations in the statement of claim shew that the purpose entrusted to the agent was one which did not involve the application of the whole of the money remitted to him, and the claim asks for relief on the footing of money had and received. This case, therefore, falls within *Friend* v. *Young* (3) and *Watson* v. *Woodman*. (1)

Cur. adv. vult.

Dec. 7. KEKEWICH J. The order of May 8, 1903, on its face limits the questions to be decided at the trial, and, having regard to the abandonment by the defendant's counsel of most of the points raised by the defence, it really limits those questions to two, namely, first, whether the defendant was the agent of the plaintiffs for the investment of their money in the purchase of prairie lands; and, secondly, whether the plaintiffs' title to an account is barred by the Statute of Limitations. I have no doubt that the agency has been proved. There is no occasion to dwell on what took place before the incorporation

(1) L. R. 20 Eq. 721. (2) [1892] 1 Ch. 154, 166.
(3) [1897] 2 Ch. 421.

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of the company or on the part taken by the defendant in the settlement of the prospectuses. Suffice it to say that the defendant himself suggested investment in prairie instead of in timber lands, and, having urged the company to remit him funds for the purposes of such investment, accepted the remittances when made for those purposes. It is impossible for him now to say that he was not the agent of the company for the employment of the money remitted to him for the purposes which he had recommended, and in connection with which he accepted the money remitted. It would be a useless expenditure of time and labour to refer again to the correspondence, which was necessarily read at considerable length in the opening of the case, or to endeavour to cull passages supporting the conclusion at which I have arrived. The defendant's letters are the letters of an agent reporting to his principal. But I must pause to notice one defence arising on the correspondence which was persisted in until the end of the trial. It is said that the letters themselves disclose the fact that the defendant had acquired the lands which were purchased by the plaintiffs, and that they must have known from those letters that they were acquiring those lands from him as vendor. There are many expressions in many of the letters consistent with the relation of vendor and purchaser; and if the plaintiffs had known, or indeed had otherwise reason to believe, that he was acting as principal they would have been bound to read his letters from that point of view. But an agent cannot be allowed to convert himself into principal by a possible construction of his language. He must tell the truth plainly, and give his principal the opportunity of determining whether he is still willing to treat with the agent on that footing. Nothing of that kind was done, and the plaintiffs were well justified in reading the defendant's letters as merely written with reference to the relation originally existing between them.

The question arising on the Statute of Limitations is only more difficult because of some authorities which at first sight conflict with others laying down general rules for the guidance of the Court in such cases as this. Nothing can be more pre-

cise than the language of Lord Hatherley L.C. and Giffard L.J. in *Burdick* v. *Garrick* (1), and that language must be held to govern this case, unless it can be shewn that it all depended on the terms of the deed by which the agency was constituted. There is nothing in the judgments to indicate that this was the intention of the learned judges who decided *Burdick* v. *Garrick* (1), and who expressed their views of the law in general terms; but in *Watson* v. *Woodman* (2) Hall V.-C. distinctly said that in his opinion *Burdick* v. *Garrick* (1) depended on the special nature of the deed under which moneys were to be received and invested; and in *Friend* v. *Young* (3) Stirling J. quoted that opinion without comment, but without disapproval. In *Watson* v. *Woodman* (2), in the passage already referred to, Hall V.-C. proceeded to quote *In re Hindmarsh* (4) as an authority that the relation of trustee and cestui que trust does not ordinarily exist between solicitor and client, although the solicitor may have received moneys from or for the client; and inasmuch as the case before him was capable of being treated as one of that character and as not depending on any special trust, I think that he must be taken to mean that *Burdick* v. *Garrick* (1), where there was a special trust, did not for that reason extend to it. The decision of Stirling J. in *Friend* v. *Young* (3) may also, I think, be properly understood as referring, not to agency in general, but to the particular relation existing in the case under his consideration, namely, that of merchant and factor. He does not thus limit his decision in words, but he takes some pains to review the legislation respecting merchant and factor as regards the application to it of the Statute of Limitations, and he concludes his judgment on that point by saying that the existence of a fiduciary relation did not prevent the defence of the statute being set up in the case before him. He certainly refers to *Burdick* v. *Garrick* (1) and *Watson* v. *Woodman* (2), which were not concerned with the relation of merchant and factor, and, as already mentioned, he quotes Hall V.-C.'s criticism of the former case without disapproval; but I venture to think that he would have said more

(1) L. R. 5 Ch. 233.
(2) L. R. 20 Eq. 721, 731.
(3) [1897] 2 Ch. 421, 432.
(4) 1 Dr. & Sm. 129.

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about *Burdick* v. *Garrick* (1) but for the obvious distinction between that case and the one before him, which distinction is explained in the preceding part of his judgment. Of the other authorities cited the only one which I think it necessary to notice is *Soar* v. *Ashwell*. (2) On this case Stirling J. in *Friend* v. *Young* (3) remarked that the plaintiffs' claim was of such a nature as could only be asserted in a Court of Equity, and that this was pointed out by Lord Esher M.R. in the commencement of his judgment. The Master of the Rolls certainly did this, and there are other passages in his judgment which shew that he was throughout determining how a Court of Equity would treat that claim; but I cannot think that the Master of the Rolls could have intended to mean more than that the case was one of trustee and cestui que trust to be decided according to the principles guiding the Court, which ordinarily takes cognizance of that relation. In the concluding sentence of his judgment he says that he is clearly convinced by the evidence that the defendant became, on receipt of the money, a trustee of it. I conceive the point of Stirling J.'s remark to be that he himself, in *Friend* v. *Young* (3), was not dealing with a case of that character, but with one quite different, involving fiduciary relation, but not that of trustee and cestui que trust, and which might therefore properly be the subject of a common law action. On the point that the case of *Soar* v. *Ashwell* (2) was one of trustee and cestui que trust, and therefore outside the Statute of Limitations, the judgment of Bowen L.J. is perfectly clear. Like the Master of the Rolls, he relies on *Burdick* v. *Garrick* (1), but before referring to that case he says (4): "It has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can

(1) L. R. 5 Ch. 233.
(2) [1893] 2 Q. B. 390.
(3) [1897] 2 Ch. 421.
(4) [1893] 2 Q. B. 397.

discharge himself except by restoring the property which he never has held otherwise than upon this confidence, and this confidence or trust imposes on him the liability of an express or direct trustee." These authorities, altogether consistent with others to which I have not thought it worth while here to refer, lead inevitably to the conclusion that in this case an express trust was constituted as between the plaintiffs and defendant, and that as regards the moneys remitted by the former to the latter for investment the plea of the Statute of Limitations cannot prevail. The plaintiffs are therefore entitled to an account. The defendant must pay the costs up to and including the trial. The subsequent costs will be reserved.

[After some discussion as to the form of the order, it was agreed that interest should begin to run from January 1, 1884, and should be at the rate of 4 per cent. per annum.]

Solicitors: *Minchin & Co.; W. Webb.*

H. B. H.

KEKEWICH J.

1904

Jan. 13.

In re CROXON.
CROXON *v.* FERRERS.

[1903 C. 978.]

Will—Construction—Name and Arms Clause—"Lawfully assume"—Impossible Condition—Condition Subsequent.

A testator, who had assumed the name and arms of C. without any colour of right thereto, devised an estate to persons in succession, and directed that every person who should become entitled, and who should not bear "his" (the testator's) surname of C. and "his" coat of arms, should, within twelve months after so becoming entitled, "lawfully assume" such name and arms, and that in default of compliance the estate should go over. The devisee first in succession, who was a son of the testator, took the name of C., but did not, within the time limited, assume the arms of C., because it appeared that it was impossible for him, under the circumstances, to obtain a grant of the arms of C. from the College of Arms or by Royal licence:—

Held, that the testator, using the words "lawfully assume," must have meant something more than a mere voluntary assumption; that in order to comply with the condition it was necessary for the devisee to obtain a proper grant of arms from the College of Arms or by Royal licence; and that as this could not be done, the condition was impossible, and, being a condition subsequent, was not binding on the devisee.

Boydell Jones Croxon (otherwise Croxton) by his will dated June 29, 1898, after directing that certain oak furniture having his coat of arms thereon should be held and enjoyed as heirlooms by the persons entitled to his real estate thereinafter devised, gave and devised certain real estate to trustees upon trust for his son, the plaintiff, Compton Herbert Croxon (otherwise Croxton), during his life without impeachment of waste, with remainder to the use of his first and other sons successively according to seniority in tail male, with remainder to the testator's grandson, the defendant, Francis Charles Cecil Ferrers, with divers remainders over, and after a bequest of residuary personal estate the will proceeded as follows: "I direct that every person who shall become entitled under this my will to the hereditaments hereinbefore devised and who shall not then bear my surname of Croxton and my coat of arms, to wit, on a ground sable a lion rampant argent debraised by a

bend componee or and gules, shall within twelve months after so becoming entitled lawfully assume such name and arms, and that in case any such person shall fail to comply with such last-mentioned direction, or shall become a priest of or take orders in the Roman Catholic Church, the estate of such person under this my will shall cease and determine, and all his rights and interests hereunder in any property real or personal shall, so far as the rules of law or equity may permit, pass to the person next entitled in remainder." The testator appointed the defendant Henry Ferrers Ferrers and the plaintiff executors of his will.

The testator died on October 15, 1902, and his will and a codicil thereto (which is not material for the present purpose) were on December 17, 1902, duly proved by the executors therein named.

The proper surname of the testator was not Croxton, but Croxon. He did not during his lifetime take any legal steps to assume the name of Croxton. But he commenced to call himself Croxton about thirty years before his death, and continued as a general rule to do so until his death.

The arms described in the name and arms clause in the will were stated in Ormerod's History of Cheshire to have been formerly borne by several members of the family of Croxton; these arms were used by the testator in his lifetime, and he caused them to be carved on the furniture mentioned in the will, all of which was purchased by him in his lifetime.

The testator claimed connection with the Cheshire family of Croxton, and for that reason used the name of Croxton and the arms described in his will. The plaintiff had made exhaustive inquiries, but was unable to ascertain that there was any foundation in fact for the testator's claim that he was connected with the Croxton family, and the plaintiff did not believe that he was so connected.

The plaintiff had for many years used the surname of Croxton instead of Croxon, and within twelve months after the testator's death, namely, on September 7, 1903, he, by deed-poll duly inrolled, assumed the surname of Croxton in lieu of his former surname of Croxon.

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CROXON, *In re.* CROXON *v.* FERRERS.

The plaintiff had ascertained that although a Royal licence for him to bear the name and arms of Croxton might be obtained, such licence would be expressed to be conditional upon such arms being first exemplified by the Heralds' College or College of Arms. He had further ascertained that the arms described in the will were undoubtedly the arms of an old Cheshire family of the name of Croxton, and that such arms would not be exemplified to him unless (which he was absolutely unable to do) he were able by strict proof to establish his descent from some member of the Croxton family who was undoubtedly entitled to the arms. A report of the Kings of Arms to that effect, verified by affidavit, was produced.

This summons was taken out by the plaintiff against the defendant Francis Charles Cecil Ferrers and other persons interested under the testator's will and codicil for the determination of numerous questions arising in reference to the testator's estate and, in particular, whether the name and arms clause contained in the will, or any and if so what part thereof, was valid and binding on the plaintiff, and if so what would constitute a sufficient compliance on the part of the plaintiff with such clause, or such part thereof as might be held to be valid and binding on the plaintiff.

It was stated that the plaintiff was in legal possession of the testator's house and of the furniture having the coat of arms thereon. The plaintiff, however, was personally resident abroad, and the furniture was only retained by him with a view to the sale of it.

Austen-Cartmell, for the plaintiff. It is submitted that the performance of this condition is impossible, and, as it is admitted that the condition is a condition subsequent, it follows that it is not binding on the plaintiff: *In re Greenwood*. (1)

The really difficult point is to ascertain what is the meaning of the expression "lawfully assume." The unauthorized assumption of arms may be described as a sort of unpunish-

(1) [1903] 1 Ch. 749.

able trespass. If a man assumes any arms he pleases, it does not appear that any Court of law can interfere. There was an old Court of Chivalry composed of the Earl Marshal and Lord High Constable, but that Court came to an end when the office of Lord High Constable was abolished; it was but a Court of Honour, and at no time had it the power of enforcing its decrees. It is submitted that the testator must, when he used the words "lawfully assume," have meant that some definite act should be done by the devisee—that is, that he should assume the arms in one of the ways which are recognised by law and custom, namely, either by a grant of arms by the College of Arms or by Royal licence, which in practice is only granted with the assent of the College or, of course, by Act of Parliament. The construction contended for on the other side is that the word "lawfully" means simply "not unlawfully"—that is, not so as to constitute an offence which is cognizable by a Court of justice. But if that construction of the word is adopted, it becomes mere surplusage.

[KEKEWICH J. Have you referred to the precedents of name and arms clauses in the books on Conveyancing?]

They appear not to use the word "lawfully," upon which everything turns in this case. From reference to the note in Davidson's Conveyancing Precedents, 3rd ed. vol. iii. Part I. p. 361, which was approved by Lord Lindley in *Earl Cowley* v. *Countess Cowley* (1), it appears that the Royal prerogative to grant arms still subsists, and it is stated that when the direction is to take the name and arms of the settlor it is conceived that (except where an Act of Parliament is obtained) the authority of the Royal licence through the College is essential. Though a man may take any arms he pleases he cannot, without a grant, make them his descendible property. A grant from the College is in the nature of a title-deed: *Stubs* v. *Stubs*. (2) In the article on armorial bearings in the Encyclopædia of the Laws of England the law is stated in the same way. If the testator had only said "assumed" without "lawfully," a mere voluntary assumption of the arms

(1) [1901] A. C. 450, 460. (2) (1862) 1 H. & C. 257.

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could not, it is submitted, have been held sufficient. In *Earl Cowley* v. *Countess Cowley* (1) the only question was as to the use of a name, and the question of arms was not raised. In *Austen* v. *Collins* (2) the very point was raised, but the case went off on another ground. It was, however, intimated that a name and arms clause required a taking of arms by a proper grant from a proper authority (namely, the College of Arms), and is not satisfied by a mere voluntary assumption of a coat of arms. In *Leigh* v. *Leigh* (3) an argument to the like effect was addressed to the Court and was not dissented from. [He referred also to the article on Heraldry in the Encyclopædia Britannica, vol. xi. pp. 683, 687; *Sir Henry Blount's Case* (4); Hawk. P. C. 8th ed. vol. ii. p. 13.]

[KEKEWICH J. referred to the Century Dictionary on the word "lawful," which was there described as meaning "not forbidden by law," and to a case before himself of *Joicey-Cecil* v. *Joicey-Cecil* reported in *The Times* newspaper of Saturday, June 11, 1898, and in No. 15 (July, 1898) of the *Genealogical Magazine*.]

Mark Romer, for the defendant entitled under the gift over. Upon the true construction of this will it is submitted that the word "lawfully" has its natural and ordinary meaning, and simply means "not unlawfully," i.e., "not in a manner contrary to the law of the land." It is specially to be observed that the testator refers to the arms as his arms. He speaks in his will of "my surname" and "my coat of arms," and it cannot be supposed that he admitted or considered that his assumption of the arms was unlawful. There can therefore be no reason why the Court in this will should give to the word "lawfully" any higher or other meaning than its ordinary meaning as defined in the Century Dictionary. I am bound to submit whether the plaintiff has not in fact assumed the arms by retaining in his possession the furniture of the testator on which the arms were placed. If that were so, there would

(1) [1900] P. 305; [1901] A. C. 450.
(2) (1886) 54 L. T. 903.
(3) (1808) 15 Ves. 92; 10 R. R. 31.
(4) (1737) 1 Atk. 295.

be an end of the case; but if he has not done so, then it is submitted that the time limited having elapsed, the condition has not been complied with, and the gift over takes effect. There is very little authority on the point. The only case which seems to have a direct bearing is *Bevan* v. *Mahon-Hagan*. (1) In that case in the Court below (2) the Vice-Chancellor intimated that the voluntary assumption of arms was not a sufficient compliance with a name and arms clause; but in the Court of Appeal, the Master of the Rolls (3) expressed the opinion that a man can assume arms voluntarily as he can a name. There is absolutely no authority that arms cannot be lawfully assumed by any one who wishes to use them, and I rely on the absence of authority and on the special wording of this will.

Wace and *Byrne*, for other parties.

KEKEWICH J. The argument has taken us into many interesting questions, but I propose to restrict myself to deciding the question of construction arising upon this will.

The difficulty is in the use by the testator of the word "lawfully." If that word were struck out of the will, there would arise, as it seems to me, a question still more difficult. There is some authority for saying that a man cannot assume arms, according to the directions of a will, except by means of a proper grant of arms, which may be a grant from the College of Arms or a Royal warrant or licence, or, of course, an Act of Parliament. There are many dicta in favour of that view, and something against it, and the etymological meaning of the word "assume" must be regarded. If I had to decide that, I should require further argument and research to find out what is the real meaning of the word "assume" in a name and arms clause of this description. But the testator has not made it a condition that the devisee shall "assume" the arms only; he has said that he shall "lawfully assume" them, and I think I must take it that by using the word "lawfully" he has meant something more than the mere word "assume." Otherwise

(1) (1892) 31 L. R. Ir. 342. (2) (1891) 27 L. R. Ir. 399, 411.
(3) 31 L. R. Ir. 356.

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the word lawfully would be superfluous, and I have no right to disregard a word if I can give some meaning to it. I read the will to see what the testator meant by "lawfully." Mr. Romer has called my attention to the way in which the words are brought in. The testator certainly does recognise his own bearing of the coat of arms which he had assumed without any grant. He evidently contemplates all the devisees taking in succession and assuming and bearing the coat of arms when they become entitled, because he imposes a condition on all those "who shall not then"—that is, when they become entitled —"bear my surname of Croxton and my coat of arms," which he proceeds to describe. If any of them was then bearing the coat of arms, however improperly and however much without any grant or authority, the condition would not touch him. He would be one of the persons who was bearing the coat of arms, and the condition would have been complied with. That is in point when the meaning of the testator has to be considered. Still he does contemplate the contingency of the devisee not being at that time a person bearing the coat of arms, and says that every such person "shall within twelve months after so becoming entitled lawfully assume such name and arms"; and then there is a gift over in the event of non-compliance with the condition. I do not think I can conclude that, because a person bearing the arms without a grant would not be affected, therefore a person who assumed the arms without any grant would bring himself within the condition. The dictionary meaning of "lawfully" is that anything is lawful which is "not forbidden by law," and no doubt in that sense when a man assumes the coat of arms of a stranger he is not acting unlawfully. The authorities shew that none of the Courts now in existence, exercising their ordinary jurisdiction, could prevent a man from bearing any arms he pleased, provided he did not interfere with rights of property. I think it is also reasonably clear that no other Court known to ancient times and exercising jurisdiction could have interfered. The Court of Chivalry only decided the facts, and decided in that sense what the law was, but it was a Court which had no power of enforcing its decrees. To my mind "lawfully"

cannot be construed as only negative, "not improper"—that is to say, taking the arms in such a way that no Court in this country would interfere. I think the testator must have intended that something should be done to give a legal colour to the title to assume the arms. Unless some such meaning as that is given to the word "lawfully," I fail to see how any meaning can be given to the word "assume." An Act of Parliament might be passed to enable this gentleman to bear these arms. But that is not a matter within his cognizance at all. He might petition Parliament for it, but I venture to think he would do so in vain. As regards the Royal licence, it really comes to the same thing, because it is clear that nothing would be granted by Royal licence except with the consent of the College of Arms, and he cannot assume the arms without an inquiry whether they are the arms of any other person; and if they prove to be, as no doubt they are, the arms belonging to a different family, he could not be allowed to assume them. The result is that in my opinion he cannot "lawfully assume" these arms within the meaning of the will; if he cannot lawfully assume the arms the performance of the condition becomes impossible; and as it is a condition subsequent and impossible, the result is that it is not a condition with which he is bound to comply in order to retain the estate.

Solicitors: *Patersons, Snow, Bloxam & Kinder, for Longueville & Co., Oswestry.*

C. C. M. D.

BYRNE J.
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Dec. 16.

In re JORDAN.
HAYWARD *v.* HAMILTON.

[1902 J. 1375.]

Practice—Parties—Settlement—Trustee—Administration—Representation of Trust Estate.

An action for breach of trust was brought by a beneficiary under a settlement against, as sole defendants, the executors of one of the two trustees, but not the surviving trustee, of the settlement. The surviving trustee was also dead, and no new trustees of the settlement had been appointed, although the person in whom the power to appoint was vested was prepared to exercise it:—

Held, that the representatives of the surviving trustee must be added as defendants, or that new trustees of the settlement must be appointed and added as defendants.

THIS was an action brought by a beneficiary under a marriage settlement dated December 11, 1869, and made between Louis Napoleon Hayward of the first part, Jane Jordan of the second part, and Charles Jordan and Daniel Ludlow of the third part, against the executors of the said Charles Jordan for replacement by the defendants out of the estate of the said Charles Jordan of a sum equal to the value of the trust properties lost by the breaches of trust of the said Charles Jordan, deceased; and if necessary the administration of the real and personal estate of Charles Jordan.

The statement of claim alleged that the trustees, Jordan and Ludlow, committed breaches of trust which resulted in a loss to the estate of about 1600*l.*; that Jordan died in 1882; that the defendants were his executors; that Ludlow died in 1886, and that no new trustees of the settlement had been appointed. L. N. Hayward was dead, and his widow, Jane Hayward, had appointed the whole of the settled funds to the plaintiff subject to her own life interest. The power to appoint new trustees of the settlement was vested in Mrs. Hayward, and she was prepared to exercise it. The plaintiff claimed "(1.) a declaration that the defendants as such executors as aforesaid are liable to make good the settlement moneys lost by the said breach

of trust of the said Charles Jordan; (2.) that a sum equivalent to the said sum lost be ordered to be set aside and invested as this Honourable Court may direct to answer the said loss; (3.) if necessary an account of the sums so lost by the said breach of trust; (4.) if necessary administration of the real and personal estate of the said Charles Jordan." Further and other relief and costs.

The only defendants to the action were the executors of Jordan.

On the action coming on for trial a preliminary objection was taken that the trustees of the settlement ought to be represented, and that for that purpose either the representatives of Ludlow, the surviving trustee, should be added as defendants, or that new trustees should be appointed and added as defendants.

Norton, K.C., and *Bailhache*, for the plaintiff.

Rowden, K.C., and *T. L. Wilkinson*, for the defendants. The suit is defective. The relief asked by the statement of claim cannot be granted in the absence of the trustees of the settlement or the representatives of the last surviving trustee. The Court will not execute the trusts in the absence of Ludlow's representatives. They are the trustees for the purposes of administration, although they may not have actually accepted the trusts. The plaintiff cannot himself sue for this money; he can only get it by administration. No doubt the liability of the trustees was joint and several, but Ludlow's representatives are nevertheless the right persons to sue for and receive payment of this money from the defendants. The authority which comes nearest to this point is *In re Harrison* (1), but the question there was whether the representatives of a trustee who was not the survivor ought to be parties.

[BYRNE J. referred to *McCheane* v. *Gyles* (*No.* 2) (2) and the Rules of the Supreme Court, Order XVI., r. 11.]

Norton, K.C., and *Bailhache*, for the plaintiff. We do not want administration or a general account. We only ask for a declaration that the defendants are liable to replace this

(1) [1891] 2 Ch. 349. (2) [1902] 1 Ch. 911.

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money so as to prevent them from distributing Jordan's estate without providing for our claim. There are no trustees of the settlement who can be joined. The representatives of Ludlow have never consented to act as trustees. We are not asking for payment to the plaintiff, but for payment into court. It will be time enough to appoint new trustees when that has been done. It is admitted that if new trustees were appointed and joined, the action would be properly constituted. That in itself shews that it is not necessary to make Ludlow's representatives parties. Ludlow was a party to the breach of trust, and his representatives could only sue Jordan for contribution.

BYRNE J. This action is brought by a beneficiary under a settlement dated in 1869, and asks for a declaration that the defendants, who are the executors of a deceased trustee, are liable as such executors to make good a loss which has occurred to the settlement funds. [His Lordship read the claim.] The only parties who are defendants to this action are the representatives of a trustee who was not the last surviving trustee; and therefore there is no one before the Court who represents the trust estate, if I may so express it. The person in whom the right to recover moneys belonging to the settlement is, if there be such a person in existence, the representative of the last surviving trustee. Cestuis que trust can come into Court to recover money which was lost, joining the person in whom the right to recover it is legally vested, by reason of the power of the Court to execute trusts and to allow beneficiaries to sue in their own names, if a sufficient case be shewn. Cases have been cited, of which *In re Harrison* (1) is the chief example, where it was held that, an action having been brought against a surviving executor and trustee, it was not necessary to make the representative of a deceased trustee a party. In that case, in an action for a general account against a surviving executor and trustee, it was held that it was not, in the absence of special circumstances, necessary for the plaintiff to make the representative of a deceased trustee or executor a

(1) [1891] 2 Ch. 349.

party. If the defendant required such representative to be added, and the circumstances of the case rendered it advisable that he should be so added, the Rules of the Supreme Court, 1883, provided by Order XVI., rr. 11, 48, the machinery for that purpose. Chitty J. gives his reasons for saying the action might be brought in that form, and he says (1): "Many judgments have been made without any opposition against a surviving executor and trustee, without joining the representatives of others who had died before the action was commenced, where there were no special circumstances in the case rendering it necessary that they should be parties. The order goes in the well-known form."

No authority has been produced to me to shew that judgment could be given in an action of this kind, which in fact involves something in the nature of a partial execution of the trusts, without having the persons representing the trust estate before the Court. It may be that there is no present trustee, as there may be no representative of the last surviving trustee, or if there be one that he has refused to accept the trusts of this settlement; but in the present case there is a person entitled to appoint new trustees of the settlement, and, if there be no trustees, such an appointment ought to be made, and there is no reason why the existing trustees, if any, or such new trustees, should not be brought before the Court.

It is argued that this action is not asking for execution of the trusts, but is only brought for a declaration that the estate of the deceased trustee is liable for breaches of trust. The plaintiff is not really entitled to be paid any money found due, and it would be difficult to make such an order except in the presence of the parties entitled to be paid, though of course in a proper case possibly somebody might be appointed to represent the capital of the trust estate. But it does not rest there. The plaintiff wants an order founded on it, namely, the investment of a sum to answer the loss. The point is of some importance, for there is no authority which covers it, and I do not say that there may not be cases in which the Court might entertain such an action as the present where it was impossible to get repre-

(1) [1891] 2 Ch. 354.

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sentatives before the Court; but where it is possible to do so some person should be appointed to represent the estate. The case must stand over to enable the representatives of the surviving trustees to be joined, or to enable new trustees to be appointed and added as defendants.

Solicitors: *Frederick Kinch, for Lyndon Moore & Co., Newport, Mon.; W. R. Smith & Smyth, for Gardners, Abergavenny.*

H. C. R.

BYRNE J. 1903 *Oct.* 31; *Nov.* 2, 3; *Dec.* 21.

WERNER MOTORS, LIMITED *v.* A. W. GAMAGE, LIMITED.

[1902 W. 2607.]

Design—Registration—Infringement—Patent and Registered Design for same Invention—Second Registered Design similar to previous Design—Marking Goods—Knowledge of Seller of infringing Goods—Undertaking to keep an Account—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), *ss.* 47, 51, 52, 58, 59, 60, 61.

The plaintiffs registered a design for improvements in motor cycles at a date between the time when they applied for and the time when they obtained letters patent for a similar invention:—

Held, that a patent and a registered design for the same invention might co-exist; the rights conferred did not clash; and the registration was valid.

The plaintiffs registered a second design, which was very similar to the first, and were said to have subsequently sold machines marked with the second registration number only:—

Held, in the absence of evidence of the truth of this allegation, that the first registration was not forfeited; but *semble*, that it was unnecessary to mark the machines with both numbers.

The defendants at the date when the action was commenced had no knowledge of the registration; but they sold some machines after the writ was issued, and, on an application for an interlocutory injunction, they offered to keep an account:—

Held, that they could not rely on want of knowledge as a reason why an injunction should not be granted, although it protected them from payment of damages for sales effected before writ.

THE plaintiff company were the registered proprietors of a design, No. 383,283, for motor bicycles, being goods comprised in class 1. In August, 1902, they brought this action for an

injunction to restrain the defendants from applying for the purpose of sale to motor cycles the plaintiffs' registered design, or any fraudulent or obvious imitation thereof.

The plaintiffs' original design was registered in this country on November 18, 1901, in the name of Michel Werner and Eugene Werner. On November 8, 1901, one A. F. Spooner, as agent for Michel and Eugene Werner, applied for letters patent in respect of an invention of improvements in frames for motor cycles alleged to be identical with their design, and letters patent in respect of this invention were subsequently granted and dated November 8, 1901.

In November, 1902, the plaintiffs registered a new design, which was very similar to their original design. It was alleged that since that date they had sold motor bicycles marked with the new registration number only.

The defendants by their defence denied infringement; alleged want of novelty in the plaintiffs' design; said that they had not applied the plaintiffs' design to any cycles "knowing that the same had been so applied without the consent of the registered proprietor"; and contended that, by registering the design as well as taking out the patent, the plaintiffs had committed a fraud on the Crown, and that the registration was invalid.

A. J. Walter and *Kerly*, for the plaintiffs.

T. Terrell, K.C., and *J. C. Graham*, for the defendants. This action is governed by the Patents, Designs, and Trade Marks Act, 1883, and the plaintiffs cannot succeed under ss. 58 and 59 unless they prove knowledge on our part that we have sold an article to which their design had been applied "knowing that the same has been so applied without the consent of the registered proprietor." We did not know that this design had been registered. The scheme of the part of the Act which relates to designs is different from that which relates to patents. Knowledge need not be proved in the case of a patent, but such evidence is indispensable where the action is for infringement of a design. There is no publication of the specification of a design, and by s. 52 a design is not

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open to inspection. If there was no knowledge of the registration of the design before the writ was issued, there was no cause of action, and the Court will not grant an injunction. Anything that has happened since the issue of the writ is immaterial: *Jan* v. *Grossman*. (1) The defendants do not threaten to continue the sale.

The registration itself was bad It is contrary to the Statute of Monopolies that the Crown should grant the sole right of manufacturing an article to two different people. The statute reserves to the Crown only the right to grant a monopoly to the first and true inventor. Here the plaintiffs had a patent for the same invention as their registered design before they registered the latter; for a patent dates from the day of application. They were proprietors of both within ss. 47, 60, 61. It cannot make any difference that both grants were made to the same person, for he might assign them to different people, and two people cannot have monopolies of the same thing. Grants of patents and designs are statutory grants under this Act and are on an equal footing.

After the plaintiffs registered their new design they ought to have put both numbers on the cycles they sold. They did not do so: therefore the registration on which they are suing is void. If the second design cannot be infringed without infringing the first design, and the number of the first design is not put on the machine, the first registration is gone.

[They also referred to *Le May* v. *Welch* (2) and *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (3)]

A. J. Walter, in reply. The evidence shews that the defendants knew of our registration. But apart from that, we are entitled to an injunction. At all events, the defendants' ignorance ceased when they were served with the writ, and yet, at the hearing of the motion, they agreed to keep an account, which implies an intention to go on selling these machines; so they cannot now be heard to say that they do not threaten and intend to do so.

There is no question of prior grant; design is a question of

(1) (1895) 12 Rep. Pat. Cas. 537. (2) (1884) 28 Ch. D. 24.
(3) (1889) 14 App. Cas. 550.

copyright, and the Statute of Monopolies has nothing to do with it. The Act does not say that you cannot have a patent and a registered design for the same article. There is no authority which says so. A patent is independent of form, whereas a design is a question of form merely, and there can be no infringement of it unless the same form is taken. The old theory that the same thing cannot be granted twice over to different persons does not apply to copyright.

Cur. adv. vult.

Dec. 21. BYRNE J. held that the design was new and original, and that it had been infringed by the defendants, and continued:—Next, as to the point raised that the defendants had no knowledge that the design was registered, I come to the conclusion, though not without a natural doubt inspired by a knowledge of the keenness with which advertisements are examined by those whose duty it is to see and look at the literature connected with the trade, that I must accept the evidence given on behalf of the defendants, with the result that the fact of registration was unknown to those persons connected with the defendant company whose duty it was to watch and know about what was doing in the trade in motor cycles prior to the issue of the writ in the action. It is not the fault of the plaintiffs that the defendants did not know; but, treating the case upon the footing that notice of registration has not been brought home to the defendant company, what is the result? Only that the plaintiffs are not entitled to damages in respect of sales effected before writ. The relevant sections of the Act are ss. 58 and 59. The defendants have not themselves applied the design, and their acts, so far as penalty or damages are concerned, appear to be protected up to the date of the service of the writ. This, however, will not protect them against an injunction unless they can bring themselves within the exception from the general rule mentioned in *Proctor* v. *Bayley*. (1) That was a case having reference to infringement of a patent, and Cotton L.J. says (2): "Where a patent is infringed the patentee has a primâ facie case for an injunction, for it is to be

(1) (1889) 42 Ch. D. 390. (2) 42 Ch. D. 398.

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presumed that an infringer intends to go on infringing, and that the patentee has a right to an injunction to prevent his doing so. Again if there has not been any infringement, but an intention to infringe is shewn, an injunction will be granted." He then goes on to deal with the facts of the particular case, and comes to the conclusion that the plaintiff was not justified in believing that the defendants intended to continue the infringement, and consequently an injunction was refused. The facts of that case were very special. There was a single and isolated act of user nearly five years before action, and the use of the machines had then been abandoned, because the defendants had found them unserviceable. The defendants in their pleadings admitted the validity of the patent, and expressly pleaded that they never threatened or intended, and did not threaten or intend, to use any apparatus infringing the plaintiff's patent. The facts in the present case differ entirely. The defendants put in an affidavit on the interlocutory application for an injunction, strongly opposing an injunction on the ground of delay in bringing the action and offering to keep an account. So far from saying they did not mean to repeat the acts, they in effect claimed the right to repeat them if they kept an account, so that justice might be done at the trial should they prove to be wrong in selling more. They have defended attacking the validity of the design, and they have since action offered to sell, though stipulating that they could give no indemnity. Four machines have also been sold since the writ. I have no doubt at all but that the defendants were threatening and intending, at and after the date of the service of the writ, to sell machines to which the registered design had been applied. If on service of the writ they had written and said that they had been in ignorance of the registration and that they did not mean to sell any more machines, or if on the motion they had offered an undertaking not to sell more, the matter would have stood on an entirely different footing. The plaintiffs had every right to suppose when they issued the writ that the defendants must know of the registered design, and want of knowledge was not raised on the motion as a defence.

In August, 1902, as I have said, the writ was issued, and in

November, 1902, the plaintiffs registered a new design which in fact was similar to the originally registered design, except as to a matter of two inches in some detail, as it was put by one of the witnesses. I am not sure that I yet appreciate the argument put forward. A man sues in respect of infringement of his design, and he, subsequently to action, registers another, and if I understand the point it is suggested that subsequent sale by him of things according to the new design without having both registration numbers upon them has occasioned a forfeiture of his right to relief. I cannot follow the reasoning. I could understand the second registration being invalid because it was in truth a second registration of the original design; but this is not the argument. Sect. 51 has reference to delivery on sale, and I have no sort of evidence that before delivery on sale any article was not caused to be duly marked.

The remaining point in the case is whether or not there has been a fraud upon the Crown, because, having registered a design under statute, the Crown has been induced to grant a patent for a machine, the grant dating back to a period before the registration of the design. There appear to me to be several answers to this. In the first place the grant from the Crown was not made until after the statutory title was created, although when made it dated back to an earlier date prior to publication; in the second place it is not a question between grant and subsequent grant from the Crown; and in the third place there is nothing inconsistent between a grant for a patent and a coincident right and existence of a statutory right to design. The object of and privilege conferred by letters patent are wholly different from the object of and privileges conferred by statute to a design by registration. They may be co-existent and the rights conferred do not clash. The patent rights may be infringed notwithstanding design, and design may be infringed though patent rights may not be touched. A design may be copied exactly without a patent for the subject being infringed, and a patent may be easily infringed without touching rights to a design. The two rights are separate and distinct in title as well as in substance, and though, no doubt, any attempt to bolster up an invalid patent, or to get the

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advantage of an equivalent to patent rights by the utilization of the right to register a design, would be jealously watched, the rights may and do fairly co-exist. I think, therefore, that the plaintiffs are entitled to an injunction in the terms of their claim, with costs.

Solicitors: *John B. & F. Purchase; Ward, Perks & McKay.*

H. C. R.

BYRNE J. 1904 *Jan.* 13, 14.

In re BEARD'S TRUSTS. BUTLIN *v.* HARRIS.

[1903 B. 2182.]

Will—Forfeiture—National School—Trust for Endowment—Control of School Board—Non-provided School—Education Authority—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 1, 5, 6 *sub-s.* 2, 7 *sub-s.* 1 (*d*), 13.

A testator who died in 1891 bequeathed investments to trustees upon trust to apply the income towards the annual expenses of a National School so long as it was "supported by voluntary subscriptions as now and heretofore in addition to the Government grant," with a gift over in the event of the said school "ceasing to be so supported or becoming subject to the control of a school board." Since the death of the testator the necessity for subscriptions had practically ceased owing to the bequest, but the managers were in debt to a small extent. In consequence of the passing of the Education Act, 1902, the school, as a public elementary school, came under the control of the county council as the education authority:—

Held, that there had been no forfeiture on either of the grounds mentioned by the testator, and that the gift over did not take effect.

ADJOURNED SUMMONS.

This was an application by the present trustees of the will of the late G. H. A. Beard, who died in May, 1891, for the opinion of the Court as to the effect of the Education Act, 1902, upon a trust for the endowment of the Leonard Stanley National Schools, Gloucestershire. The will, so far as material, and the facts were as follows:—

The testator bequeathed "to the managers for the time being of the Leonard Stanley National Schools" thirty shares in the County of Gloucester Bank, Limited, to be held by the said managers with power to vary investments, "upon trust to pay

and apply the interest or income thereof in or towards the annual expenses of the said schools so long as the said schools shall be supported by voluntary subscriptions as now and heretofore (or by a voluntary rate) in addition to the Government grant; but in the event of the said schools ceasing to be so supported, or becoming subject to the control of a school board," then the testator declared, directed, and bequeathed that the said bank shares, or the investments for the time being representing the same, should go and be transferred or paid to the vicar and churchwardens for the time being of the parish of Leonard Stanley, to be held and applied by them, in their absolute discretion, in or towards the repairs, improvements, or restoration of the fabric of the church of the said parish.

The thirty bank shares had been duly transferred by the executors of the will into the names of the managers for the time being of the Leonard Stanley National Schools, and the investments representing the same, which produced an income of about 115*l.* per annum, still stood in the names of some of the present managers as trustees of this fund.

These particular schools were the only public elementary schools in the parish of Leonard Stanley; the school-house was provided by voluntary subscriptions, and was erected upon land belonging to a private owner, for which the managers paid a rental of 1*s.* per annum; there was no trust deed, but the schools were founded and had always been conducted as Church of England schools; four foundation managers had recently been appointed under the provisions of s. 11 of the Education Act, 1902, and two other managers had been appointed, one by the Gloucestershire County Council and one by the parish council, pursuant to s. 6, sub-s. 2, of the said Act.

Up to the death of the testator the schools had had no endowment except a sum of 15*l.* per annum, and the remainder of the expenses of the schools, other than such as were defrayed by the Government grant, had been provided by voluntary subscriptions, the testator in his lifetime being one of the most generous of the supporters of the schools.

Since the death of the testator the income of the trust fund had been very nearly sufficient, with the 15*l.* and the Government

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grant, to support the schools without the necessity for private subscriptions. During the last few years there had been a small annual deficit, at the present time amounting to about 63*l.*, which had been provided for by an overdraft at the bank for which the managers were personally responsible.

There was evidence that some portion of the income of the fund, or voluntary subscriptions or both, would probably be needed to provide a fund for the repairs of the school buildings, or to make such alterations and improvements thereto as might be reasonably required by the local authority in accordance with s. 7, sub-s. 1 (*d*); it also appeared that the increased Government grant provided by s. 10, sub-s. 1, would probably be more than sufficient, with the income of the fund and the 15*l.*, to provide for the maintenance of the schools, without any necessity for further help from the rates.

In consequence of the passing of the Education Act, 1902, the question now arose whether the income arising from the said thirty bank shares should, as from the appointed day mentioned in the said Act, continue to be applied towards the annual expenses of the schools or be otherwise dealt with as directed by the Act, or whether the said bank shares and dividends thereon from that date should be transferred and paid to the vicar and churchwardens for the time being of the said parish, to be applied by them in accordance with the trusts of the will.

The only question argued upon this application was whether, in the events which had happened, the gift over to the vicar and churchwardens took effect.

Cave, for the trustees of the fund.

W. Baker, for the present managers. The Education Act, 1902, has not altered the construction of the will, the trust being to apply the income of the fund towards the annual expenses of the schools. Since the testator's death there has not been the same need for subscriptions as there used to be owing to his generosity, but subscriptions will now become necessary to provide a fund for the repair of the buildings in accordance with s. 7, sub-s. 1 (*d*), of the Act of 1902. The

managers, too, being in debt, must subscribe or get subscriptions; the schools, therefore, have not ceased to be supported by voluntary subscriptions within the meaning of the trust, and no forfeiture has taken place on this ground. The new education authority is not a school board, and by means of the foundation managers the schools will be conducted on the same lines as heretofore: this was what the testator wished to provide for; the event contemplated by the testator has not yet happened.

George Lawrence, for the Gloucestershire County Council, adopted the above argument. The gift stands so long as the schools are not supported by public moneys, e.g., by the Government grant and the rates. It appears that the increased Government grant provided by s. 10 of the Act will be sufficient, with the existing endowment and the income of this fund, to provide for all the expenses of these schools. Having regard to the fact that the testator by this very gift has made voluntary subscriptions practically unnecessary, too strict an interpretation must not be placed on the first part of this clause. Sect. 5 of the Act abolishes school boards in express terms. The education authority created by the Act is an entirely different body from the former school board. Neither of the events contemplated by this testator has happened; there has consequently been no forfeiture, and the income of this fund is still applicable towards the expenses of these schools.

Gatey, for the vicar and churchwardens. The gift over takes effect on the happening of either of the two events specified by the testator. On the facts, it is clear that the schools have ceased to be supported by subscriptions as heretofore; since the testator's death subscriptions have not been required. These schools have in effect come under the control of a school board. The new education authority is only a school board under another name; by s. 25, sub-s. 1, of the 1902 Act, and the 2nd schedule (2.), the powers, rights, and liabilities of any school board are to be transferred to the council exercising the powers of the school board. The county council is substituted for the school board; a fresh set of managers is created who may or may not conduct the schools on the same

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religious lines: this was the very event the testator wished to provide against. On both these grounds, and one is enough, there has been a forfeiture, and the fund ought to be transferred to the vicar and churchwardens in accordance with the trust.

BYRNE J., after reading the gift in the will, continued:—The testator died in 1891. During his lifetime he appears to have found money, when it was wanted, for the purposes of these schools; the schools are built on property in respect of which only a shilling a year is paid, and there were a certain number of subscriptions—what the amount of the subscriptions was, when they were paid, or whether they were levied yearly or not, I have no information; but up to the time of the death of the testator, money was found by him and by others for the purposes of the schools when required. There was also an endowment bringing in about 15*l.* a year which was applicable to the purposes of the schools, and which has continued to be so applicable up to the present time.

After the death of the testator there appears to have been another gentleman who from time to time gave money for the schools when it was wanted; but I do not understand that there ever was occasion to call for subscriptions generally, or to get annual or other subscribers for the schools, except to this extent, that year by year there has been some small deficit, to meet which the managers have, on their own credit, obtained an overdraft with the bank. In all these years it does not appear that more than about 63*l.* is due to the bankers. That is a sum which, unless some money is forthcoming by means of subscriptions or otherwise, the managers have taken on themselves the liability to pay, and, therefore, if the bank should require them to pay the money and they were to pay it, they would have no right against any one else to get it back if there were no funds belonging to the schools for the purpose, and they would in fact become subscribers to this extent, or would have to obtain subscriptions for this amount. That I think is a fair way of describing the position.

Now, in consequence of the gift of the testator and in con-

sequence of the passing of the Education Act of 1902 (if those funds given by the testator are available in addition to the old endowment and in addition to the Government grant provided by s. 10 of the Act of 1902), it appears that there will now be ample funds for carrying on these schools properly without having to call for any further subscriptions, and, indeed, perhaps enough to pay off in a short time that sum due to the bankers for past over-expenditure. It is argued on behalf of the vicar and churchwardens that the gift over has taken effect, by reason of the fact that there has been nothing like a receipt of subscriptions, either annually or otherwise, for the period I have mentioned, and further, that the gift over takes effect either if the schools "cease to be supported by voluntary subscriptions as now and heretofore in addition to the Government grant," or in the event of its becoming "subject to the control of a school board." With reference to its becoming subject to the control of a school board, I am satisfied that that event has not taken place, because this school has never yet come under the control of the school board. The local education authority is now the county council. It is true that the county council has vested in it a great many duties which formerly fell to be discharged by the school boards; but the Act expressly abolishes school boards in so many words. The new body which now performs some of those duties (not all) is a different body, elected by a different constituency and having certain different rights and powers.

Then the question is, Can the schools be said now to be "supported by voluntary subscriptions as now and heretofore in addition to the Government grant"? How were they supported by voluntary subscriptions before, in the testator's lifetime? They were supported, in so far as the endowment and the grant were not sufficient, by subscriptions; but the testator, knowing the position of affairs, gave the annual income of this fund in or towards the annual expenses of the schools so long as they shall be "supported by voluntary subscriptions as now and heretofore"—that is, in aid of the endowment for the time being existing; and it appears to me he must have contemplated that these subscriptions that he

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referred to would only be such subscriptions, if any, as were necessary, with the endowment, to support the schools.

In my opinion there has not yet been any forfeiture under this clause, and consequently the trustees are not bound to transfer this fund to the vicar and churchwardens.

Solicitors: *Le Brasseur & Oakley, for E. B. Haygarth, Cirencester; Walker & Rowe, for J. Lapage Norris, Stroud; Field, Roscoe & Co., for E. T. Gardom, Gloucester.*

W. C. D.

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In re THE BODEGA COMPANY, LIMITED.

Company—Articles—Director—Contract with Company—Secret Interest of Director—Vacating Office—Company's Lien on Director's Shares for Repayment of Fees—Money paid under Mistake of Fact—Quantum Meruit.

Where the articles of a company provide that a director shall vacate his office on the happening of some event or the doing of some act, a director automatically vacates his office on the happening of the event or the act being done; and the board have no power to waive the event, or to condone the offence or the act, which causes the vacation of the office.

The articles of a company provided (art. 21) that the company should have a first and paramount lien upon the shares of any shareholder for any money due from him to the company; (art. 70) that the office of any director should be vacated if he (inter alia) should be concerned in or participate in any contract with the company not disclosed to and authorized by the board; and (art. 75) that the remuneration of the directors should be 1400*l.* a year, to be divided among them in such manner as the majority of them should direct. W. was a director of the company, and on December 24, 1900, he became secretly concerned in a contract with the company, and did not disclose his interest to the board; the transaction came to an end in June, 1901. At general meetings of the company held on July 8, 1901 and 1902, W. in the usual way retired from office and was re-elected a director. In February, 1903, the board first discovered W.'s secret interest in the contract of December, 1900. He then ceased to act as a director and sold his shares in the company; but the board refused to register the transfer of the shares, and claimed that the company under art. 21 had a lien on the shares for the repayment by W. of the moneys paid to him (under a resolution of the board) between December, 1900, and February, 1903, as his proportion of the directors' fees under art. 75:—

Held, that under art. 70, W. automatically vacated his office of a director on December 24, 1900.

Turnbull v. *West Riding Athletic Club*, (1894) 70 L. T. 92, discussed and distinguished.

But *held*, that W.'s disqualification for office only continued so long as the contract continued, and ceased when the transaction came to an end in June, 1901; consequently his re-elections to office in July, 1901 and 1902, were valid:

Held, also, that W. was not entitled to a quantum meruit for his services as a director rendered to the company between December 24, 1900, and July 8, 1901, but that the company were entitled to recover from him the fees paid him during that period as being moneys paid him under the mistake of fact that he was a director, and that the company had a lien on his shares for those moneys.

MOTION.

The Bodega Company, Limited, was registered in March, 1881, under the Companies Acts, 1862 to 1880, with memorandum and articles of association. The material articles were as follows:—

"21. The company shall have a first and paramount lien upon the shares of any shareholder for any money due from him to the company, alone or jointly with any other person . . . ."

"29. The directors may decline to register any transfer of shares whilst the shareholder making the same, either alone or jointly with any other person, is indebted to the company in respect of such shares, or for any other reason which the directors may consider sufficient."

"70. The office of any director shall be vacated—

"If he becomes bankrupt.

"If he becomes lunatic . . . .

"If he be concerned in or participate in the profits of any contract with the company not disclosed to and authorized by the board."

"75. The remuneration of the directors shall as from the 31st of March, 1887, be 1400*l.* a year, to be distributed among them in such manner as a majority of the directors may direct." (This article was passed and confirmed as a special resolution at general meetings of the company in March, 1887.)

A Mr. Wolseley was one of the first directors, and also the chairman of the company. He held 300 fully paid-up shares in the company. At the annual general meeting of the

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company held on July 8, 1901, he retired from office and was re-elected a director, and at the annual general meeting held on July 8, 1902, he again retired from office and was re-elected a director. In 1897, under a resolution of the board, his proportion of the 1400*l.* a year payable to the directors under art. 75 was fixed at 40*l.* a month, and this monthly sum was regularly paid him from 1897 until February, 1903, when he ceased to act as a director in consequence of the following circumstances:—

Shortly before December, 1900, the directors instructed a solicitor to negotiate, as agent for and on behalf of the company, for the purchase of certain property at Nottingham. On December 19, 1900, the solicitor attended a meeting of the board, and reported that he had completed the negotiations for the Nottingham property for the sum of 12,000*l.*, and that a deposit of 1200*l.* was to be paid by the company. The board thereupon authorized him to enter into a contract for the purchase of the property by the company, and at a board meeting held on January 2, 1901, bills for 1200*l.*, the amount of the deposit, were handed to him. The conveyance of the property to the company was executed by the vendor on June 24, 1901, when the company were let into possession and paid 8000*l.*, but left 4000*l.* unpaid, and the conveyance remained in the custody of the solicitor. Subsequently, in July, 1902, it transpired that the solicitor had personally become the purchaser of the property on December 24, 1900, for 8000*l.* only, and had paid a deposit of 800*l.*, and that 4000*l.*, the difference between the 8000*l.* and 12,000*l.*, was intended to be a profit for himself. The board thereupon refused to pay the 4000*l.*, and by deed dated March 25, 1903, the solicitor gave up all claim to it. Early in February, 1903, the board for the first time discovered that in December, 1900, there had been a secret arrangement between Wolseley and the solicitor, under which they were to share the profit of 4000*l.* between them; and Wolseley, at the request of the board, wrote them a letter on February 25, 1903, admitting this secret arrangement, and that he had under art. 70 vacated his office as a director of the company.

By deed dated August 5, 1903, four of the directors of the company who held office with Wolseley between January 30, 1901, and February 1, 1903, assigned to the company all their share or interest in the sum of 980*l.* 11*s.* 4*d.*, being the amount paid to Wolseley as his share of directors' fees under art. 75 during the above period.

In September, 1903, the company commenced an action in the Scottish Courts against Wolseley, who was then resident in Scotland, to recover (1.) 400*l.* paid him by the directors out of the assets of the company in July, 1901, as special remuneration for his services, and (2.) the said sum of 980*l.* 11*s.* 4*d.*, on the ground that these sums had been paid to him under a mistake of fact. In October, 1903, Wolseley sold his 300 shares in the company, and lodged with the company for registration the usual form of transfer to the purchaser; but the board refused to register the transfer on the ground that the company had under art. 21 a first and paramount lien on Wolseley's shares for the 400*l.* and 980*l.* 11*s.* 4*d.* He then moved to rectify the register by inserting therein the name of the purchaser as the holder of his shares. On the motion coming on for hearing, it was arranged that all further proceedings in the Scottish action should be stayed, and that this Court should decide all the questions at issue between the parties.

During the arguments it was conceded that the payment of the 400*l.* to Wolseley in July, 1901, was indefensible, and that judgment must go against him for repayment of that sum; and this report deals mainly with the question of the directors' fees.

Upjohn, K.C., and *J. F. Galbraith*, for the motion. The company have no lien on the shares for two reasons: first, on the true construction of art. 70 the office is not vacated until the board have held a special meeting and afforded the director an opportunity of giving his explanation: *Turnbull* v. *West Riding Athletic Club* (1); secondly, money paid under a mistake of fact cannot be recovered unless the mistake has been such as to cause a total failure of consideration: *Moses* v.

(1) 70 L. T. 92.

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Macferlan (1); *Aiken* v. *Short*. (2) Here there was only a partial failure of consideration. Assuming that Wolseley vacated office on December 24, 1900, the date of the contract, his disqualification only continued until June 24, 1901, when the contract was completed, and his subsequent re-elections were good. From December, 1900, to February, 1902, Wolseley, whether qualified or not, was in constant attendance at the offices of the company and assiduous in his duties as a director, and is at any rate entitled to a quantum meruit. He did the work of a director, and money paid for services rendered, whether upon an express or implied request, cannot be recovered. Further, under art. 75, the fees were paid by the company to the directors, and they divided them amongst those who did the work. The company, therefore, are not entitled to have the fees repaid, although they have taken assignments from the other directors.

Jenkins, *K.C.*, and *A. Neilson*, for the company. First, as to the vacation of office. "Vacate" is a perfectly plain word, and infers an automatic action. Under art. 70 a director vacates his office if he does a certain act. It is a bargain between him and the company, and not between him and his co-directors. Therefore Wolseley by the act, ipso facto, ceased to be a director: Palmer's Company Precedents, 8th ed. Part I. p. 615; *Hunnings* v. *Williamson*. (3) It is difficult to reconcile *Turnbull* v. *West Riding Athletic Club* (4) with the principle of the decision of the Court of Appeal in *Hunnings* v. *Williamson* (3), but it may be distinguishable on the facts. Next, as to the directors' fees. The right to recover them is in the company, or in the directors who were in office at the time. The payment was induced by the mistake of fact that he was a director, and it is no answer to say that they cannot recover because there was not a total failure of consideration. The bargain was that he should honestly do his best as a director of the company in all matters in which he was concerned. At common law, if an agent makes a secret profit in the business in which he is employed by his principal, the principal can

(1) (1760) 2 Burr. 1005, 1012.
(2) (1856) 1 H. & N. 210.
(3) (1883) 11 Q. B. D. 533.
(4) 70 L. T. 92.

recover from him, not only the secret profit, but also the remuneration or commission paid him for his services: *Salomons* v. *Pender* (1); *Andrews* v. *Ramsay & Co.* (2) The same principle applies here, and the company can recover the fees paid Wolseley since the vacation of his office, independently of being assigns of the other directors, because he could have sued the company for his proportion of the fees if the directors had not paid him.

[FARWELL J. referred to *Caridad Copper Mining Co.* v. *Swallow.* (3)]

In that case there had not been a resolution of the board. Here, if there had been no mistake of fact and Wolseley had not been paid his fees, he would have had an unanswerable claim (*a*) as against the company under art. 75, and (*b*) as against the directors under the resolution of the board. If they had found out the mistake before he had been paid and had refused to pay him, their position would have been unassailable, and *Andrews* v. *Ramsay & Co.* (2) shews that he could not set up a quantum meruit. Lastly, Wolseley's disqualification was a continuing one. He remained concerned in the contract after July, 1901, and his re-elections make no difference. When the conveyance was executed in June, 1901, and the 4000*l.* was not paid, the solicitor under his contract had the lien of an unpaid vendor, in which Wolseley was interested, and that interest continued until the contract was definitely avoided in March, 1903. Therefore, the company have a lien on his shares for the 980*l.* 11*s.* 4*d.*

Upjohn, K.C., in reply. On the true facts, there was not a contract between the solicitor and the company in which Wolseley was concerned. It was a tort. But if it was a contract, there was no continuing contract after July 8, 1901. The company got the property on June 24, 1901, when they paid the 8000*l.*, and the vendor's lien did not arise. Art. 70 points to vacating office on becoming concerned for the first time in a contract, and does not mean being concerned from time to time in the contract: *Dawson* v. *African Consolidated*

(1) (1865) 3 H. & C. 639.
(2) (1903) 19 Times L. R. 620; since reported [1903] 2 K. B. 635.
(3) [1902] 2 K. B. 44.

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Land and Trading Co. (1) Here the act was done once for all when the price was fixed in December at 12,000*l.*, and Wolseley's disqualification did not extend to his re-election in July, 1901.

FARWELL J. This case under the guise of an innocent application to rectify the register has raised several points of some difficulty. It is a case of considerable demerit on the part of a director. In December, 1900, the applicant, Mr. Wolseley, was chairman of the board of directors, and on the admitted facts he and a solicitor entered into a conspiracy by which they proposed to defraud the company out of a sum of 4000*l.* The modus operandi was this. The company were minded to buy a public-house at Nottingham, and they authorized a solicitor to negotiate for its purchase. He bought it for himself for 8000*l.*, and reported to the company that he had bought it for them for 12,000*l.* He was thereupon authorized on December 24, 1900, to enter into a contract for 12,000*l.*, and was given bills to pay a 10 per cent. deposit on that footing. The contract having been thus entered into was carried out by a conveyance dated June 24, 1901. The conveyance recites that the vendor Kidd, the owner of the property, had lately contracted with the solicitor for the sale to him for 8000*l.*, and that the solicitor had agreed with the company to transfer to them the benefit of the contract for 4000*l.*; and then there is a conveyance in consideration of both the sums of 8000*l.* and 4000*l.*, which are acknowledged to have been paid by the company to the two parties. I should add that the 4000*l.* was not paid. The facts were not discovered by the company until July, 1902, and thereupon there were angry protests, and finally the solicitor, by a deed dated March 25, 1903, released all claims he might have against the company for the 4000*l.* which never had been paid; so that, fortunately, the intended fraud on the company failed to take effect. Now the first point is this. The company's articles contain, amongst others, this provision: "The office of a director shall be vacated . . . . If he is concerned in or participate

(1) [1898] 1 Ch. 6.

in the profits of any contract with the company not disclosed to and authorized by the board." It is admitted that this contract was not disclosed to or authorized by the board. The contract in question is the contract entered into by the solicitor for the resale or transfer to the company at this profit. It is quite clear that this contract, mixed up as it was with the contract by Kidd with the solicitor which was represented to the company as a contract by Kidd with the company, is one which the company never would have authorized if they had known the circumstances. The company enter into this contract, and in that contract Wolseley was admittedly concerned. Wolseley and the solicitor were co-conspirators from the beginning, and this was the machinery by which they sought to carry out their scheme. Wolseley, therefore, was concerned in the contract from the beginning. The office of director is vacated if he be concerned in any contract, and the question is this: Does the director, who is himself concerned in a contract not disclosed, thereupon, as it is put in Palmer's Company Precedents, 8th ed. Part I. p. 615, ipso facto, i.e., automatically, vacate his office, or does anything further remain to be done? In my opinion it is quite plain on the words of the article that he ipso facto, or automatically, vacates his office on the act being done: there is no distinction between this and the other events mentioned in the article, e.g., bankruptcy, and in none of them is there any locus pœnitentiæ for him, or any means by which the directors can condone the offence or the act which causes the vacation. The office is vacated automatically, and if his co-directors wish him still to act, he has to be re-elected in the usual way; or the casual vacancy has to be filled up under the article to that effect. The directors have nothing whatever to do with the vacation of the office by an event over which they have no control, and with which they have nothing to do except to satisfy themselves that the fact has happened, if the fact be put in issue. In this case there is no dispute of fact, because it is admitted that the director was concerned in the contract. My difficulty on this point is the decision of Kekewich J. in the case of *Turnbull* v. *West Riding Athletic*

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Club (1); but as I read that case, the learned judge was addressing his mind to a different state of circumstances. The article there was practically, though not absolutely, identical with the article in the present case. The directors took on themselves to call a meeting and to declare his office vacant, and the learned judge in effect said: "As you chose to call that meeting for the purpose of declaring this man no longer a director, you ought in common fairness to have given him notice of it." I do not think anybody would find any fault with that view. If you are proposing to adjudicate upon a man's conduct and position, you ought at least to give him notice of it, and give him the opportunity of being heard. But if the learned judge meant to say that the fact was not of itself sufficient, that something more must be done, and that the director might possibly have been so plausible that he might have won over the directors, I respectfully disagree, for I cannot see what useful purpose it would serve if he had won over every director. The fact would have remained, and the fact was absolutely impossible to get over. The result, therefore, is that in my opinion Wolseley on being concerned in the contract vacated his office as a director of the company.

What further happened was this. The directors were elected every year for a year, and he went out of office with the other directors at the general meeting of the company held on the following 8th of July, 1901, and was re-elected a director. He held office for that year, and was again re-elected on July 8, 1902. Now the vacation of his office by the contract of December 24, 1900, which I will assume for the moment, was a vacation of his then office as a director and did not in my opinion disqualify him from thereafter being elected as a director. I do not understand the article to mean that, if a man be concerned in a contract not disclosed, and he thereby vacates his office, he cannot be elected in a subsequent year. To my mind it is not a continuing disqualification unless the work to be done under the contract is a continuing work. If the work to be done under the contract ought to be reviewed by the director concerned in the contract, and the discretion

(1) 70 L. T. 92.

which the company are entitled to expect from that director is still to be exercised after the next election, then, and then only, the re-election would be avoided by the continuing contract. But when, as here, it is a contract made once for all for a particular purchase, and the matter comes to an end in the current year, then, I think, it only applies to the particular holding of the directorship for the current year. I am, therefore, of opinion that he vacated his office on entering into the contract, and that that vacation lasted until July 8, 1901, when he was re-elected.

Now as to the date of the contract. In my opinion the only date I can take on the evidence is December 24, 1900, when I think there was this contract entered into by the two conspirators with the company; and that being so, from that date Wolseley vacated his directorship. Then there comes the conveyance of June 24, 1901, which recites the contract, and then proceeds to convey to the company. Now 4000*l.*, part of the purchase-money, was not paid. It has been argued that on the conveyance to the company, when 8000*l.* only was paid and 4000*l.* was left unpaid, there would be a lien arising for that unpaid purchase-money. I do not think I am concerned to consider that question, because in my view the transaction for this purpose came to an end on June 24, when the conveyance was executed and the money was not paid, and there really remained no further occasion for the exercise of any discretion which would render the services of the director necessary. The mischief was then done, and could only be remedied by discovery, and not by any exercise of discretion. I hold, therefore, that the only period to which this claim for refunding applies is from December 24, 1900, to July 8, 1901.

Now Mr. Wolseley claims to have a transfer of his shares in the company to a purchaser from him, and the company resist that claim on the ground that Mr. Wolseley owes them money, and that they have a lien on his shares for that money. I may mention the sum of 400*l.* which was paid him as an extraordinary allowance, not under any article of the company and not as part of the 1400*l.* which the directors were entitled to divide amongst themselves under art. 75, but as an extra

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sum given him by the directors. It is quite clear on *In re Newman & Co.* (1) and other authorities that that was utterly unjustifiable, and that sum of money must be refunded. Therefore, I dismiss the 400*l.* from further consideration by saying that until that sum is paid there certainly cannot be a rectification of the register.

The other question with reference to the fees is a more difficult one. Under art. 75 the remuneration of the directors was, as and from March 31, 1887, to be 1400*l.* a year, to be distributed amongst them in such proportion as the majority might direct. In 1897 there was a resolution of the directors, which has been acted on ever since, under which the directors received certain proportions, and Mr. Wolseley's particular proportion was 40*l.* a month. Now the 40*l.* a month has been paid to Mr. Wolseley in respect of his services as a director, and what the company now claim is to have those fees refunded either to themselves in their own right, or to themselves as the assigns of the other directors, as being money paid either under a mistake of fact or on a total failure of consideration. Lord Mansfield, speaking of the action for money had and received in *Moses* v. *Macferlan* (2), says: "It lies for money paid by mistake; or upon a consideration which happens to fail." The mistake on which you can recover must, as Bramwell B. puts it in *Aiken* v. *Short* (3), be a mistake "as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money." That, I apprehend, means this. If you are claiming to have money repaid on the ground of mistake, you must shew the mistake is one which led you to suppose you were legally liable to pay. The same proposition is really involved in the second head—total failure of consideration. I will deal with the company first in its own right. If the company was liable to pay, it was because it had impliedly contracted with the director to pay him for his services by requesting and accepting the benefit of those services, although he was not a director.

(1) [1895] 1 Ch. 674. (2) 2 Burr. 1012.
(3) 1 H. & N. 210, 215.

Wolseley was not entitled under any express contract, but claims on a quantum meruit. But a plaintiff cannot recover for services rendered to and accepted by a defendant, unless they were so rendered at the defendant's request; the acceptance of the services rendered raises a presumption that such request was made; but this, like any other presumption, may be rebutted; and it is, in my opinion, rebutted if it be shewn that the acceptance was given under such circumstances of mistake as to render it incredible that the services ever would have been accepted if the true facts had been known—at any rate, in a case like the present, where Wolseley knew the true facts and knew that the other directors were unaware of them. If then I apply Bramwell B.'s test, the money was paid under the mistaken belief that Wolseley was a director: if this had not been a mistake, the company would have been liable. The company and the other directors were further under the mistaken belief that Wolseley had done nothing which would render it unfit for them to request him to perform the duties of a director; if this had not been a mistake, they might have been liable to pay on the request implied from acceptance of his services. Again, if I treat the case as an action to recover money on the ground of total failure of consideration, it is equally entitled to succeed; for consideration must mean sufficient consideration to support an action at law; and services rendered without request expressed or implied are not sufficient. In the present case it is clear that the company never would have requested Wolseley to do the work if they had known the facts, and had known he was not a director. Wolseley, by his silence and concealment of his misconduct, misled the company and the other directors into making a request which they otherwise certainly would not have made. Whether the claim be treated as made by the company in their own capacity or as assignees of the other directors I do not think is very material; if the company have not suffered by having to pay over again, at any rate the directors have suffered because they have, on the footing that Wolseley was a director, paid him for his services as a director a share of the 1400*l.*, which was only to be divided amongst

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the directors. If I apply the same test to them as I do to the company, I certainly could not imply that they, knowing the circumstances, ever would have requested Wolseley to do the work which he did, if they had known that he was not a director. He was to be remunerated as a director, and the other directors never would have requested him, either impliedly or expressly, to act as a director when they knew he had ceased to be a director by reason of such conduct as this. The result is, in my opinion, that the fees paid Mr. Wolseley from December 24, 1900, to July 8, 1901, must be refunded by him. With regard to the rest of the company's claim, he was re-elected a director in July, 1901, and I cannot hold that there has been any vacating of office because he had been guilty of conduct which, if known, would have induced the company not to elect him. He was a director from July, 1901, and has done the work, and so far as that portion of the company's claim is concerned their claim fails. Under the circumstances, and having regard to the nature of the case, I refuse Mr. Wolseley's motion with costs. It was, however, agreed that I should award the proper relief between the parties in respect of all matters in dispute. On that footing there must be an order on Mr. Wolseley to repay the company the 400*l.*, plus the sum of 235*l.* (which I understand is now the agreed amount of the fees to be refunded); and on payment of these sums, with interest at 4 per cent. on the 400*l.* from the date that it was paid to Wolseley, the company will pass the transfer of his shares. He must also pay the costs of the proceedings in Scotland.

Solicitors for Mr. Wolseley: *Parker & Richardson.*
Solicitors for company: *Gadsden & Treherne.*

H. L. F.

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Dec. 1.

In re SKINNER.
COOPER *v.* SKINNER.

[1901 S. 2743.]

Practice — Administration — Trustee — Neglect to account — Originating Summons — Costs — Costs of taking and vouching Account.

In a case where proceedings for administration are rendered necessary by the gross and indefensible neglect of trustees to deliver accounts, the defaulting trustees may be ordered to pay all the costs, including the costs of taking and vouching the accounts. Such an order may be made in proceedings commenced by originating summons.

Hewett v. *Foster*, (1844) 7 Beav. 348; 64 R. R. 98, held not to represent the modern practice.

William Edward Skinner, the testator in this matter, by his will dated August 2, 1898, appointed his two sons, William Henry Skinner and Edward Skinner, and Albert Neve, a solicitor practising in Hastings, executors and trustees of his will, and, after giving an annuity of 104*l.* to his wife, gave to the trustees a legacy of 2000*l.* charged upon the whole of his estate, subject to the said annuity, to be held upon trust for his daughter, Mary Elizabeth Cooper, for life, and after her death for her children. He gave four houses in North Street, St. Leonards-on-Sea, subject to a mortgage, and certain shares in a building society to his son Edward; he gave all his residuary estate to his trustees, upon trust to convert at such time and in such manner as they in their absolute discretion should think fit. The will, which contained a power for Neve to charge for all business transacted by him in executing the trusts of the will and its execution, was attested by Neve's clerk.

The testator died on March 31, 1899.

The will and codicil were proved by all three executors on June 29, and the widow died on October 27 in the same year.

The testator's estate consisted of freehold and leasehold houses at St. Leonards-on-Sea, all subject to mortgages, and certain shares in the St. Leonards Gas Company and other companies and building societies connected with the town.

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W. H. Skinner was an invalid, having had an attack of paralysis shortly before the testator's death, and he was excluded by his co-trustees from all part in the management of the testator's estate.

Up to August, 1900, Neve left the whole management of the estate to Edward Skinner. He alleged that this was done by the special wish of the testator; but this was denied. In August, 1900, at the request of W. H. Skinner, a firm of auctioneers were appointed to receive the rents; but Edward Skinner continued to receive the rent of the four houses devised to him, though they were subject to the charge of the trust legacy for 2000*l.* Edward Skinner had made payments to Mrs. Cooper on account of the interest of this legacy; but the interest had never been paid in full, and nothing had been set aside to answer the principal.

Mrs. Cooper and W. H. Skinner had repeatedly applied to Neve and Edward Skinner for an account, but no account of any sort was delivered except that in September, 1900, Edward Skinner sent to Neve, and Neve sent on to Mrs. Cooper and W. H. Skinner, a rough list of receipts and payments, making no distinction between capital and income.

On June 24, 1901, the testator's daughter, Mrs. Cooper, took out a summons, asking for an account of the testator's estate under Order LV., r. 3 (*c*), and that if and so far as might be necessary the testator's real and personal estate might be administered by the Court. The three trustees were made defendants.

On the hearing of this summons a full administration order was made; and the question whether the costs up to and including the hearing ought to be paid by the defendants Neve and Edward Skinner was reserved.

The account was taken in chambers, and the master, by his certificate dated June 16, 1903, found that there were debts, chiefly mortgage debts, due from the testator's estate amounting to 3582*l.*, and there were balances due from Neve and Edward Skinner of 152*l.* 11*s.* 2*d.* on account of personal estate, and 119*l.* 6*s.* 2*d.* on account of real estate, and from Edward Skinner alone of 30*l.* on account of real estate, and 199*l.* 13*s.* 7*d.*

on account of personal estate. He also found that nothing had been received by the defendant W. H. Skinner.

The case now came on for hearing on further consideration.

The defendant, W. H. Skinner, had died pending the action, and his executors had been added as defendants.

Edward Skinner was a person wholly without means, and did not appear.

It was admitted that there would be no residue of the testator's estate after paying debts and legacies, and it was doubtful whether the trust legacy of 2000*l.* could be raised without having recourse to the four houses given to Edward Skinner.

Upjohn, K.C., and *Cababé*, for the plaintiff. The proceedings have been rendered necessary by the conduct of the trustees, Edward Skinner and Neve, and they ought to pay all the costs: *Heugh* v. *Scard* (1); and this must include the costs of taking the account as well as the reserved costs: *Easton* v. *Landor*. (2) We do not ask for costs against the estate of W. H. Skinner.

Methold, for W. H. Skinner's executors.

Holman Gregory, for Neve. The defendant Neve was continually trying to get accounts from Edward Skinner. It was the wish of the testator that the management of his property should be left to his son Edward, and Neve was justified in carrying out that wish. In any case, the defendants ought not to be made to pay more than the costs up to the hearing. Trustees are always allowed the costs of taking the accounts: *Hewett* v. *Foster*. (3)

FARWELL J. In this case the testator died as long ago as March 31, 1899. This proceeding for an account, and if and so far as necessary for the administration of the estate, was commenced by summons on June 24, 1901. During all that time, in spite of repeated applications by the plaintiff for a proper account, no accounts had been rendered by the defendants

(1) (1875) 33 L. T. 659. (2) (1892) 62 L. J. (Ch.) 164.
(3) 7 Beav. 348; 64 R. R. 98.

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to any of the beneficiaries, except one cash account which no one suggests was proper or sufficient. The plaintiff is entitled to a legacy of 2000*l.*, and to a share in the residue of the testator's estate. The will was proved by the three executors and trustees named therein, two of whom were the testator's sons, and the third was the defendant Neve, a solicitor who prepared the will, which contained a power for a solicitor trustee to charge for his services. One of the sons seems to have been ill, and to have been excluded by the other two executors from acting in the administration of the estate.

The gist of the complaint against the defendants E. Skinner and Neve is that they would not, and did not, render any proper accounts, though repeatedly requested to do so by the plaintiff and by W. H. Skinner, their co-executor. Now it is clear that in the case of a small estate like this it is very hard that the plaintiff should be obliged to have recourse to proceedings of this nature in order to get an account. I am always very unwilling to make trustees pay costs; but, on the other hand, beneficiaries have a right to expect the performance of their duty by executors, and not the less when one of them has power to make professional charges. In my opinion the conduct of these two defendants amounts to a gross neglect to account. In *Heugh* v. *Scard* (1) Sir George Jessel laid down the rule thus: "It is a matter of some importance that executors and trustees should understand my rule on the subject of costs. The question of costs being discretionary, it is impossible to lay down a rule binding on any other branch of the Court. But it is, nevertheless, well that executors and trustees should understand what I think to be the proper rule. In certain cases of mere neglect or refusal to furnish accounts, when the neglect is very gross or the refusal wholly indefensible, I reserve to myself the right of making the executor or trustee pay the costs of litigation caused by his neglect or refusal."

Now this present case does appear to me to be one where the neglect was very gross and the refusal wholly indefensible. The judge before whom the matter originally came reserved

(1) 33 L. T. 659.

the costs down to and including the hearing to be dealt with on further consideration, and on that reservation I now have no hesitation in saying that they ought to be paid by the defendants Edward Skinner and Neve. Then comes the question as to the costs of taking the account. I think that the view expressed by Lord Langdale in *Hewett* v. *Foster* (1), as explained by the Court of Appeal in *Easton* v. *Landor* (2), was a correct statement of the law applicable at the date of the case before him. Under the old practice, inasmuch as every one interested in the estate had a right to have the accounts taken in Court, the order for an account in an administration action went as a matter of course, and the costs of taking it came as a general rule out of the estate. But that is no longer the case now. Since October 24, 1883, there is no longer any such general right to have an account taken, and it is by no means a matter of course that the costs of taking the account are paid out of the estate. The result is that I have to decide which of the two parties shall bear the costs of taking and vouching the accounts. I have come to the conclusion in the circumstances that I ought to make these two defendants pay them.

The remaining costs must be reserved. Some question may arise on the construction of the will, and I do not think I ought to order these two defendants to bear the whole of the costs. The houses remaining unrealized must be sold, and the plaintiff must have the conduct of the sale.

Solicitors: *G. W. Dampney; Charles H. W. Osborn; S. G. Spreat.*

(1) 7 Beav. 348; 64 R. R. 98. (2) 62 L. J. (Ch.) 164.

J. R. B.

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Dec. 10, 11.

In re CLARK. McKECKNIE *v.* CLARK.

[1903 C. 1973.]

Administration—Will—Home Trustees—Foreign Trustees—Foreign Bonds—Foreign Shares transferable Abroad or in London—Locality—English Assets.

A testator domiciled in England by his will bequeathed all his personal estate in the United Kingdom to certain persons, whom he called his "home trustees," upon certain trusts; and he bequeathed all his personal estate in South Africa to certain other persons, whom he called his "foreign trustees," upon other trusts. At the time of his decease the testator was possessed of the bonds payable to bearer of a waterworks company in South Africa, and of the shares of mining companies in South Africa. The bonds were only payable in South Africa. The mining companies were constituted according to the laws of the Transvaal and Orange Free State, and had their head offices in South Africa, where the register of shareholders was kept and the directors met; but they also had an office in London, where a duplicate register was kept and shares could be transferred. The testator's name was on the London register of the companies, and all his bonds and share certificates were at his bankers in London:—

Held, that the bonds passed under the bequest to the "foreign trustees," but that the shares passed under the bequest to the "home trustees."

ADJOURNED SUMMONS.

W. G. Clark by his will dated June 5, 1890, after making certain specific and pecuniary bequests, devised and bequeathed all his real estate in the United Kingdom, and all the residue of his personal estate and effects whatsoever within the United Kingdom (all which real estate and residuary personal estate was thereinafter referred to as his residuary estate), to his wife Jane Clark, his son Douglas as and when he should attain the age of twenty-one years, and his friend Donald McKechnie the elder (who and the other trustees or trustee for the time being of his residuary estate were thereinafter called his "home trustees") upon trusts for the benefit of his wife during widowhood, and, after her death or remarriage (whichever event should first happen), upon usual trusts for his two sons and a daughter as therein mentioned. And the testator devised and

bequeathed all his real and personal property, estates, and effects in Natal and Orange Free State and elsewhere in South Africa unto his said son Douglas Clark, as and when he should attain the age of twenty-one years, and his friends Neil Malcolm McKechnie, and Donald McKechnie the younger (both of Harrismith in the Orange Free State—which three persons and the survivors or survivor of them, or other the trustees or trustee for the time being of his said last-mentioned real and personal property, estates, and effects, were thereinafter called his "foreign trustees"), upon trust for his sons Douglas Clark and Colin Clark, share and share alike, as tenants in common. And the testator declared that the receipts of his "foreign trustees" for any moneys, stocks, funds, shares, or securities which should be paid or transferred to them by virtue of his said will should effectually discharge the persons paying or transferring the same from liability to see to the application thereof; and that his "home trustees" should not be bound to see to or inquire into any matter relating to the sale, collection, getting in, and conversion of any of his said property in South Africa, but that his foreign trustees should exclusively be responsible therefor, but only as regards their own acts or defaults, and not so as to be accountable for the acts or defaults of the other of them, or for any banker, broker, or other person with whom any of such moneys, stocks, funds, shares, or securities should for the time being be deposited. And the said testator appointed his said wife, his said son Douglas Clark when he should attain the age of twenty-one years, and the said Donald McKechnie the elder executors of his said will.

The testator died domiciled in England in October, 1902, and his will was proved in London by the widow and Donald McKechnie the elder, power being reserved to make the like grant to the son Douglas Clark on his attaining twenty-one.

The testator at the time of his death was engaged in carrying on an extensive business in London, which consisted largely in exporting goods to persons resident in South Africa, and at the time of his death there were simple contract debts due to him in respect of his business from these persons in South Africa.

The testator at the time of his death was also possessed

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of numerous investments in commercial and industrial undertakings in South Africa; and in particular of (1.) bonds of the Port Elizabeth Waterworks Company payable to bearer; and (2.) shares in numerous South African gold mining companies constituted or registered according to the laws of the late South African Republic or Orange Free State. All these mining companies had their head office and board of directors and register of shareholders in South Africa, but they also had an office and a duplicate register in London (with directors or officers) where transfers of shares could be registered on production of probate or of the certificates. The waterworks company, however, had no office in England, and its bonds were only payable at its office in South Africa. The testator's name was on the London register of all the mining companies, and all his bonds and share certificates were lodged with his bankers in London, and the question arose whether these bonds and shares on the construction of the testator's will passed under the bequest to the home trustees or under the bequest to the foreign trustees.

Romer, for the executors.

Upjohn, *K.C.*, and *Clayton*, for the widow and daughter. For the purposes of probate the shares and bonds are subject to duty in England: *Attorney-General* v. *Dimond* (1); *Attorney-General* v. *Hope* (2); *Attorney-General* v. *Bouwens* (3); *Stern* v. *Reg.* (4); and it is submitted that the principle of those cases applies to determine the construction of a will, i.e., if personal property is locally situated in England for the purposes of probate duty it is so situated for all the purposes of the will. That principle covers these bonds and shares because the executors can effectually dispose of them under the English probate, and therefore they are English assets. As to simple contract debts, primâ facie a debt is locally situated where the debtor is resident: *Guthrie* v.

(1) (1831) 1 C. & J. 356; 35 R. R. 732.

(2) (1834) 1 C. M. & R. 530; 37 R. R. 29.

(3) (1838) 4 M. & W. 171; 51 R. R. 517.

(4) [1896] 1 Q. B. 211.

Walrond (1); *Earl of Tyrone* v. *Marquis of Waterford* (2); and, if the same rule applies to bond debts, it is conceded that the bonds in question are locally situated in South Africa. But the bonds are payable to bearer and transferable on delivery, and fall, it is submitted, within the principle of *Attorney-General* v. *Bouwens*. (3) As to the shares, they are all marketable securities in this country. The share certificates are here, and they can all be transferred at the London register on production of the probate.

Jenkins, *K.C.*, and *MacSwinney*, for the two sons. The cases on the English Probate Duty Acts are not in point. It is a question of intention on the construction of the will. There is only one set of executors. They have to collect the assets, and hand over the English assets to the home trustees and the African assets to the foreign trustees. The power to give receipts, &c., that follows the bequest of the African assets supports this view. As to shares, it is well settled that they are locally situate where the head office of the company is: *Attorney-General* v. *Higgins* (4); *In the Goods of Ewing* (5); and the fact that the company for the convenience of their shareholders have an office and duplicate register in London, and that the certificates are in London, makes no difference. Certificates are mere indicia of title, and do not fix the estate with duty unless they are bona notabilia. As to the bonds, they are clearly within the principle of *Guthrie* v. *Walrond*. (1)

Upjohn, *K.C.*, in reply.

FARWELL J. I think I must construe this will without reference to the revenue cases that have been cited, although they are useful as shewing that debts may have a locality. The testator here has unfortunately used words which give rise to a great deal of difficulty. [His Lordship read the will, and continued:—] Now the testator had, amongst other property, bonds of the Port Elizabeth Waterworks Company, and shares in commercial undertakings in South Africa, and it is

(1) (1883) 22 Ch. D. 573.
(2) (1860) 1 D. F. & J. 613.
(3) 4 M. & W. 171; 51 R. R. 517.
(4) (1857) 2 H. & N. 339.
(5) (1881) 6 P. D. 19.

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with these bonds and shares that I have to deal. With regard to the bonds, it is conceded that if they are on the same footing as simple contract debts the rule is, in construing a will, that the debts are, so far as they can have a locality at all, to be considered to be located where the debtor is resident; and for this purpose I do not see any ground for drawing a distinction between a bond and a simple contract debt. For fiscal purposes, no doubt, a distinction may be drawn between the two, but there does not appear to be any reference to that point in the case of *Guthrie* v. *Walrond* (1), which was a case on the construction of a will. There Fry J. did not suggest any such distinction, but held that debts do not follow the person of the creditor, but the question is where to sue the debtor. On this point, therefore, I will follow the decision in *Guthrie* v. *Walrond*. (1) Then there comes this question of the shares, about which I feel considerable difficulty. The testator was possessed of shares in a number of South African companies, i.e., companies constituted according to the law of the Transvaal and Orange Free State. Those companies all have offices in London as well as in South Africa, with boards of directors or officers, for the purpose of conducting the business of the company, of transferring shares and issuing share certificates here as well as in South Africa. So far, therefore, as regards any locality or situation of the share register or the means of transferring shares, it is impossible to say whether South Africa or England has the greater claim to be regarded as a guide to the Court as to what the testator meant by the words he used. I am asked to construe the will as if the words were, not "my real and personal estate in the Orange Free State and elsewhere," but as if they were, "all my real and personal estate and shares in companies in the Orange Free State and elsewhere"; but those are not the words used. I have got to find out the locality of the personal estate, whether English or South African. The property I have to deal with is a share, and that is represented by a certificate without which no transfer can take place. The actual effective transfer can be done equally effectually in

(1) 22 Ch. D. 573.

South Africa or in England, and the only conceivable distinction that I can discover in point of locality is the possession of the certificate which for this purpose is essential to complete the title to the shares. Therefore I hold that where the certificates of the shares in these companies were in England they pass under the gift of property situated in England, and not under the gift of property in South Africa.

Solicitors: *Minet, Harvie & Co.; Vanderpump, Son & Wood.*

H. L. F.

In re WHITAKER. WHITAKER *v.* PALMER.

[1898 W. 2749.]

Administration—Insolvent Estate—Estate Insolvent at date of Judgment afterwards found sufficient to pay Principal of Debts—Interest—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 40, *sub-ss.* 4, 5—*Rules of Supreme Court*, 1883, *Order* LV., *rr.* 62, 63.

In the administration of an estate which is insolvent at the date of the judgment, but afterwards realizes enough to pay the principal of all the debts, but not the whole of the interest allowed by the Court, whether on debts which by law carry interest, or on debts which do not, the payment of interest must be governed by the rules of bankruptcy and not those of the Chancery Division.

In re Henley, (1896) 75 L. T. 307, discussed and not followed.

In this action an order was made on February 13, 1899, for the administration of the testator's estate and the execution of the trusts of two settlements, one of which was voluntary. The estate was then insolvent, and was so found by the master's certificate. On a previous summons (1) it had been decided by Cozens-Hardy J. and the Court of Appeal that, by virtue of s. 10 of the Judicature Act, 1875, the trustees of the voluntary settlement were entitled to prove for a sum of 5000*l.*, which the testator had covenanted to pay to them, pari passu with the creditors for value.

By subsequent orders in the action the other settlement was

(1) *In re Whitaker, Whitaker* v. *Palmer*, [1900] 2 Ch. 676; [1901] 1 Ch. 9.

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set aside, except so far as related to an annuity thereby settled upon the testator's widow, and it was ordered that an annuity should be purchased for her, and the residue of the property subject to this settlement should be paid into court in this action. The money so paid in made the assets sufficient to pay the principal of all the testator's debts and leave a surplus of about 600*l*. This was not sufficient to pay in full interest from the date of the judgment upon a debt due to the Cardiff branch of the London and Provincial Bank, the only debt which by law carried interest.

This summons was taken out by the plaintiffs, the trustees of the voluntary settlement, asking that the costs of all parties should be taxed and the funds in court distributed.

The only question which arose was whether the surplus should be applied in paying interest to all the creditors rateably, or all paid to the bank as the only creditor whose debt by law carried interest, i.e., whether the distribution of the surplus was to be governed by the rules of bankruptcy or those prevailing in the Chancery Division. (1)

S. B. L. Druce, for the trustees of the voluntary settlement.

(1) The practice in bankruptcy as to interest is governed by s. 40 of the Act of 1883:—

Sub-s. 4: "Subject to the provisions of this Act all debts proved in the bankruptcy shall be paid pari passu."

Sub-s. 5: "If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy."

The Chancery practice is governed by the Rules of the Supreme Court, Order LV.:—

Rule 62: "Where a judgment or order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest shall be computed on such debts as to such of them as carry interest after the rate they respectively carry, and as to all others after the rate of four per cent. per annum from the date of the judgment or order."

Rule 63: "A creditor whose debt does not carry interest, who comes in and establishes the same before the judge in chambers under a judgment or order of the Court or of the judge in chambers, shall be entitled to interest upon his debt at the rate of four per cent. per annum from the date of the judgment or order out of any assets which may remain after satisfying the costs of the cause or matter, the debts established, and the interest of such debts as by law carry interest."

E. Ford, for the bank. As soon as there is a surplus to distribute, the Bankruptcy Rules cease to apply, and the surplus must be distributed according to the rules of the Chancery Division. The exact point was decided by North J. in *In re Henley*. (1) The decision of the Court of appeal in this matter—*In re Whitaker* (2)—precluded me from claiming priority over the trustees of the voluntary settlement so long as the rules for insolvent estates apply. Now they have ceased to apply, and rule 63 of Order LV. of the Rules of the Supreme Court gives me priority. None of the creditors whose debts do not by law carry interest can receive any interest till interest on my debt has been paid in full, and the trustees of the voluntary settlement come last of all for their interest.

T. L. Wilkinson, for creditors whose debts did not by law carry interest. The case of *In re Henley* (1) is distinguishable. There the estate had become sufficient to pay in full the principal of the debts and the interest on the debts which by law carried interest. It was therefore solvent, for interest upon debts which do not by law carry interest is a mere creation of the Court of Equity, which has been described as a bounty, and an estate is not insolvent because it cannot pay this interest. But in this case the estate is not solvent, for it cannot pay even the interest which is by law payable.

The result of the judgments of the Court of Appeal in *In re Whitaker* (2) is to lay down a wider rule than that acted on in the earlier cases, and to make the rules of bankruptcy apply throughout in the administration of insolvent estates.

E. P. Hewitt, for another creditor in the same class. *In re Hopkins* (3) decided that an estate afterwards turning out solvent which had been considered insolvent does not prevent the Bankruptcy Rules as to realizing securities from applying. *In re Leng* (4) shews that the Bankruptcy Rules apply where an estate is only insolvent in the sense that it is insufficient to pay the costs of the suit in addition to other liabilities. [He also referred to *In re Summers*. (5)]

(1) 75 L. T. 307.
(2) [1901] 1 Ch. 9.
(3) (1881) 18 Ch. D. 370.
(4) [1895] 1 Ch. 652.
(5) (1879) 13 Ch. D. 136.

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J. G. Micklethwait, for other creditors of the same class.
J. G. Wood, for the executors of the testator's will.

FARWELL J. This case raises a point of some difficulty. Prior to the Judicature Act, 1875, the rules in bankruptcy and those which prevailed in the Chancery Division differed as to the payment of interest on debts due from an insolvent estate, and the question before me is which set of rules is to be applied in this particular case. Sect. 10 of the Judicature Act, 1875, provides that, "In the administration by the Court of the assets of any person . . . . whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable . . . . as may be in force for the time being under the law of bankruptcy." The first inquiry to be made is, Does this estate "prove to be insufficient for the payment of the debts and liabilities of the deceased"? It was insufficient at the date of the judgment, and is so found by the master's certificate. But since that date, owing to the recovery of certain securities from a settlement which was set aside, it has increased in value, and is now sufficient to pay the principal of all the debts, and leave a small surplus applicable to payment of interest. But this surplus is not sufficient to pay interest in full up to the date of final judgment even on the debts which by law carry interest. The question is whether, that being so, the estate is insufficient within the meaning of s. 10. If it is, the surplus must be applied in paying interest since the date of the judgment, according to the rules in bankruptcy, which give interest on all proved debts equally. If it is not, the surplus must be applied according to Order LV., r. 63, which gives priority to the debts which by law carry interest. Whether the estate is insufficient or not is a question of fact. Creditors who come in under an administration decree have a right to interest, and until every creditor has been paid the amount of his debt and interest, whether the interest is given to him by the general law or by the rules of Order LV., the estate cannot be said to have

discharged its debts and liabilities. I am of opinion, therefore, that this estate is still insufficient to discharge the debts and liabilities of the testator within the meaning of s. 10. Then do the rules of bankruptcy apply to this case? But for the judgment of North J. in *In re Henley* (1), I should have thought it clear that they did. The point seems to me to come within the principle of Rigby L.J.'s judgment in *In re Whitaker* (2) on a question arising in this action. He says: "Sect. 10 provides (among other things) that the rules for the time being in force in bankruptcy as to debts provable shall apply in the administration by the High Court of the estate of a deceased insolvent. Upon the true construction of the words, I think they do not simply deal with the proof of debts. The same rules are to prevail 'as to debts and liabilities provable.' I cannot read those words as meaning simply 'as to the proof of debts and liabilities.' I think they mean that whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable shall apply in the administration of insolvent estates in Chancery."

It is said that the interest in this case is not provable in bankruptcy. It is true that in a sense a creditor does not prove for it, but he gets it as incidental to his proof and to his provable debt. I think that in the passage I have read Rigby L.J. meant to shew that the Court took a wider view of the construction of this section than had been done in the earlier cases, and especially by Fry J. in *In re Maggi*. (3) It would be a curious result if the Court were, by following the distinction laid down by North J. in *In re Henley* (1), to pay the principal of the debts in accordance with one set of principles and the interest upon the same debts in accordance with another. It is possible that that decision is distinguishable, on the ground urged by counsel for the creditors whose debts do not carry interest at law, that in that case the estate really was solvent at the time of the final distribution because it was sufficient to pay the principal of all the debts and the interest

(1) 75 L. T. 307. (2) [1901] 1 Ch. 9, 12.
(3) (1882) 20 Ch. D. 545.

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on those debts which by law carried interest, though it was not sufficient to pay the interest, which has been called a bounty given by the Court, on the debts which did not by law carry interest. But in my view it is really immaterial whether that case is distinguishable or not. It was probably a sound decision according to the state of the law when it was given; but in my opinion it is inconsistent with the passage I read from Rigby L.J.'s judgment in *In re Whitaker* (1), and that of Cozens-Hardy J. in the Court below (2), and I think that the Court of Appeal in that case intended to overrule the earlier cases. I do not, therefore, propose to follow *In re Henley* (3), and the result is that the present surplus must be distributed in accordance with the rules of bankruptcy.

Solicitors: *Gamlen, Burdett & Gamlen; Ridsdale & Son, for Grover, Grover & Williamson, Cardiff; Indermaur & Brown; Stow, Preston & Lyttelton, for Keary, Stokes & White, Chippenham.*

(1) [1901] 1 Ch. 9. (2) [1900] 2 Ch. 676.
(3) 75 L. T. 307.

J. R. B.

Referred to. CHARLES RICKARDS, LD. *v.* OPPENHAIM [1950] 1 K. B. 616

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Dec. 8, 9, 16.

[1903 B. 1535.]

Construction of Documents — Time—Month — Lunar Month — Commercial Documents — Option to purchase Patent Rights within Six Months— Contract to extend Time implied from Contract—Notice of Exercise of Option sent by Post—Time of Exercise.

In legal documents the primary meaning of month is lunar month. There is no general exception making it mean calendar month in commercial documents. It can only bear that meaning in cases where, according to the ordinary rules of construction of documents, a secondary meaning can be admitted. The belief or subsequent conduct of the parties cannot affect the construction, but an agreement to extend the time may be inferred from conduct which would make it inequitable to insist on the limit to lunar months. The exercise of an option to purchase patent rights is within the rule laid down in *Henthorn* v. *Fraser*, [1892] 2 Ch. 27; and if the circumstances shew that the parties must have contemplated that the post might be used as a means of communicating on all subjects connected with the contract, the option will be well exercised at the time of posting notice of its exercise.

By an agreement in writing dated September 29, 1902, and made between the defendant Moore and the plaintiff Bruner, after reciting that the defendant was the inventor of a sewing-machine attachment for which letters patent had been applied for in Great Britain and in various other European countries, and that the plaintiff was desirous of obtaining the sole and exclusive option during a certain period of time to purchase the right, title, and interest of the said Moore in the said invention for the following countries, namely, Great Britain and Ireland, Germany, Austria, Hungary, Russia, Belgium, Luxemburg, Italy, Switzerland, Spain, and Portugal, it was agreed, in consideration of 400*l.* paid by Bruner to Moore, that "Said Moore hereby grants unto said Bruner the exclusive option to purchase, either for himself or his nominees, during the period of six months from the date of this agreement, all his right, title, and interest in and to said invention, and all improvements thereon and letters patent therefor which have

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already been or may hereafter be applied for in said countries, upon the following terms and condition :—

"The purchase price shall be the sum of 8000*l.* sterling net cash.

"During the said period of option or any extension thereof said Bruner shall have a right to sell to a third party the patent rights for any one or more of said countries for a less sum than 8000*l.*, provided he first obtain the consent of said Moore to such sale, in which case eighty per cent. (80%) of the amount received therefor shall be paid to said Moore on account of the said total net sum of 8000*l.*, and twenty per cent. shall be paid to said Bruner."

The agreement contained further clauses binding Moore to assign the patents on payment of 8000*l.*, and providing that the proceedings to obtain patents should be carried out at Moore's expense, except in the case of Germany, where the patents were to be taken out at the expense of Bruner.

The plaintiff and defendant were both citizens of the United States residing for the time at hotels in London. The plaintiff soon after the agreement went abroad, and until the end of March, 1903, was constantly engaged in negotiations for selling the patent rights in the different countries named, being all the time in constant communication by letter and telegram with the plaintiff. In December, 1902, the plaintiff agreed that the rights for England should be sold for 2000*l.*, to be paid to the defendant on account of the 8000*l.*, and a company had been formed and registered for the purpose of acquiring them at that price.

Before the end of March, 1903, the plaintiff had, with the consent of the defendant, entered into agreements to sell the rights for Russia, Belgium, and Luxemburg for 2000*l.*, payable 1000*l.* on execution of the agreement and 1000*l.* on issue of the Russian patents; and the defendant, being in Italy in January, 1903, had himself negotiated the sale of the Italian patents for 2000*l.*

The plaintiff had also agreed to sell the German patents for 2000*l.*, payable 1000*l.* in cash and 1000*l.* by a promissory note; but the defendant denied that he had consented to this sale.

On March 23, 1903, the plaintiff, who had returned to London, wrote to the defendant, who was then in Rome, in a long letter dealing with proposed sales: "The duration of my option will expire in a few days. I would like to have an extension for two months if necessary, in order to enable me to close up these matters with some profit to myself. Please telegraph me immediately on receipt of this whether you will grant me this extension. Otherwise I shall have no resource but to borrow the necessary moneys, which would involve me in the virtual cutting down of any appreciable profit for my work and expense. I do not think such is your wish."

On March 26 the defendant telegraphed from Rome to the plaintiff in London, in answer to a request from the plaintiff for his address: "Hotel Gênes, Genoa, Friday — Paris, Monday." The Friday was March 27; Monday was March 30.

On March 27 the defendant telegraphed from Genoa to plaintiff: "No extension until I see you."

On March 28 the plaintiff sent from London a telegram addressed to the defendant at Hotel Gênes, Genoa: "Have money ready to carry out option in exchange for documents. When can I see you?"

On the same day he wrote a letter to defendant to the address given in Paris, confirming and repeating his telegram, stating that he had received the defendant's telegram, and was surprised at it, as the defendant would not arrive in London until the time for exercising the option had expired, and adding: "Kindly let me know when I may expect to see you in London for the purpose of executing the necessary documents."

The plaintiff had left Genoa on the morning of March 28 for Paris, by way of Monte Carlo, before the telegram arrived. He received both letter and telegram in Paris on March 30. He shortly afterwards returned to England, and refused to carry out his agreement with the plaintiff on the ground that the option had not been exercised in time.

The plaintiff brought this action for specific performance of the agreement.

Jenkins, K.C., and *Jessel*, for the plaintiff.

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Upjohn, K.C., and *J. A. Hay*, for the defendant. The plaintiff is trying to get the advantage of the contract without performing his part of it, by contending until the trial that the defendant must accept the promises or liabilities of sub-purchasers from him instead of cash. The defendant is, therefore, justified in taking all technical objections. The option was not exercised in time, because (1.) months in the agreement means lunar months, and six lunar months would expire on March 16, 1903; (2.) no notice of the exercise of the option reached the defendant before the expiration of six calendar months.

(1.) It is settled law that months in a legal document means lunar months unless there is evidence from the context or from circumstances existing at the date of the contract that the parties meant calendar months. The subsequent behaviour or belief of the parties is quite immaterial: *Simpson* v. *Margitson*. (1)

[FARWELL J. Is not the case within *Hughes* v. *Metropolitan Ry. Co.*? (2) There were letters and telegrams after April 16 which led the plaintiff on to continue working under the contract.]

In that case there was conduct on the plaintiff's part which was held to lead the defendant to suppose that the notice to repair which had been given was suspended. There was nothing of the kind here. The parties were under a common mistake that the contract was for six calendar months. But nothing was done which could lead the plaintiff to suppose that any right under the contract would not be enforced. Options being unilateral are very strictly construed.

But the option was not exercised within six calendar months. Assuming that it could be exercised up to midnight on March 29, it could only be exercised by a notice which the defendant received within the time, not by posting a letter or sending a telegram.

[FARWELL J. referred to *Henthorn* v. *Fraser*. (3)]

It would be a great extension of that case to make it apply

(1) (1847) 11 Q. B. 23. (2) (1877) 2 App. Cas. 439.
(3) [1892] 2 Ch. 27.

where the parties were at a great distance, and to a notice to exercise an option. The notice required is quite different from the mere acceptance of an offer. There is nothing to suggest that the defendant made the Post Office in London his agent to receive notice. The Post Office can only have been the plaintiff's agent to give notice, and they did not do it in time.

Jenkins, K.C., in reply. It appears from *Reg.* v. *Inhabitants of Chawton* (1), and from a dictum of Pollock C.B. in *Hart* v. *Middleton* (2), that there is a general exception of all commercial documents from the rule that month means lunar months.

The cases are summed up in Stroud's Judicial Dictionary, article "Month," p. 484.

There does not seem to have been any definition of what commercial documents include. I submit that they should be deemed to include all documents between business men relating to business matters.

What is a matter of business was discussed in *In re Mutton.* (3)

The Court will recognise general usage, for it is held that in mortgage transactions month means calendar month: *Hutton* v. *Brown.* (4) There is no doubt that in general usage among business men month always means calendar month, and in this case both parties intended that it should have that meaning.

Cur. adv. vult.

Dec. 16. FARWELL J. This is an action for specific performance of a contract dated September 29, 1902. [His Lordship read the contract set out above, and continued:—]

The first question arises on the option, which is given for value and is, therefore, not revocable—Are the six months given for its exercise lunar or calendar months? Although in the Ecclesiastical Courts months mean calendar months (see *Catesby's Case* (5), second resolution, and per Knight Bruce V.-C. in *Bluck* v. *Rackham* (6)), it is well settled that at common law

(1) (1841) 1 Q. B. 247; 55 R. R. 246.
(2) (1845) 2 C. & K. 9.
(3) (1887) 19 Q. B. D. 102.
(4) (1881) 29 W. R. 928.
(5) (1606) 6 Rep. 62 a.
(6) (1846) 5 Moo. P. C. 305, 308.

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"months" denote lunar months; so much so, that when it has been desired to make an alteration, it has been necessary to have recourse to statute or statutory rules—e.g., as to the construction of Acts of Parliament by 13 & 14 Vict. c. 21, and as to bills of exchange by 45 & 46 Vict. c. 61, and as to documents which are part of any legal procedure under the rules of Court by Order LXIV., r. 1. It is, therefore, a question of construction in each case, to which the ordinary rules of construction apply, namely, that words must bear their ordinary primary meaning unless the context of the instrument read as a whole, or surrounding contemporaneous circumstances, shew that the secondary meaning expresses the real intention of the parties, or unless the words are used in connection with some place, trade, or the like, in which they have acquired the secondary meaning as their customary meaning quoad hoc. This is a question of fact which (unless so often proved as to be judicially recognised) has to be proved by evidence. Statements by either party as to the sense in which he used or intended to use the words made subsequently to the execution of the document and subsequent acts of the parties are inadmissible for the purpose of construing the document. This is, in my opinion, the meaning of the judgment in *Simpson* v. *Margitson* (1), where Lord Denman says: "It is clear that the construction of a written contract, subject to the exceptions mentioned below, is for the judge. It is also clear that 'months' denote at law 'lunar months,' unless there is admissible evidence of an intention in the parties using the word to denote 'calendar months.' If the context shews that calendar months were intended, the judge may adopt that construction: *Lang* v. *Gale* (2); *Reg.* v. *Inhabitants of Chawton*. (3) If the surrounding circumstances, at the time the instrument was made, shew that the parties intended to use the word, not in its primary or strict sense, but in some secondary meaning, the judge may construe it from such circumstances, according to the intention of the parties: *Goldshede* v. *Swan* (4); *Walker* v. *Hunter* (5); Bacon's Maxims,

(1) 11 Q. B. 23, 31.
(2) (1813) 1 M. & S. 111.
(3) 1 Q. B. 247; 55 R. R. 246.
(4) (1847) 1 Ex. 154.
(5) (1845) 2 C. B. 324.

Reg. 10, and the examples there given; *Mallan* v. *May* (1); *Beckford* v. *Crutwell*. (2) If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that peculiar sense: *Smith* v. *Wilson* (3); *Grant* v. *Maddox* (4); *Jolly* v. *Young*. (5) If the meaning of a word depends upon the usage of the place where anything under the instrument is to be done, evidence of such usage must be left to the jury: *Robertson* v. *Jackson* (6); *Bourne* v. *Gatliff*. (7) Also the jury may have to give the meaning of some technical words." I have only expressed my own opinion in consequence of Mr. Jenkins' argument that, in addition to the cases mentioned by Lord Denman, there was a general exception of all mercantile or commercial documents, founded on a dictum of Littledale J. in *Reg.* v. *Inhabitants of Chawton* (8), and repeated in some of the text-books. In my opinion, there is not, and cannot be, any such general exception.

If any such exception be set up, it must be proved in each case (unless judicially recognised) as a customary usage in the particular trade or place. Erle C.J.'s ruling in *Turner* v. *Barlow* (9)—"The law in all cases, not mercantile transactions, in the City of London, as to the meaning of the word month, meant lunar month. In all mercantile transactions in the City of London a month means calendar month"—accords with this. It is a statement of a judicially recognised custom in the City, and I do not think that Littledale J. in *Reg.* v. *Inhabitants of Chawton* (8) meant to do more than refer generally and tersely to the customary qualification of the meaning of the word. A contrary holding would necessitate a definition of "mercantile or commercial transactions"—a task of no small difficulty, unless I adopted the plaintiff's suggestion that all contracts for sale of goods and chattels, including patents, are mercantile transactions. I hold, therefore, that "months" in

(1) (1844) 13 M. & W. 511.
(2) (1832) 1 Moo. & R. 187.
(3) (1832) 3 B. & Ad. 728; 37 R. R. 536.
(4) (1846) 15 M. & W. 737.
(5) (1794) 1 Esp. 186.
(6) (1845) 2 C. B. 412.
(7) (1844) 11 Cl. & F. 45; 44 R. R. 723.
(8) 1 Q. B. 247; 55 R. R. 246.
(9) (1863) 3 F. & F. 946, 949.

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this contract means lunar months, and it is agreed that, if this be so, the option would expire on March 16.

But although the contract bears this primary meaning, and the subsequent acts of the parties are not admissible in order to alter the meaning, there is nothing to prevent the parties from coming to a subsequent agreement having the effect of extending the period of option, and such agreement need not be in writing (apart from the Statute of Frauds, of which there is no question in the present case), but may be implied from a course of conduct (as in *Const* v. *Harris* (1) and *Pilling* v. *Pilling* (2), the principle of which, "modus et conventio vincunt legem," is not confined to partnership cases), and may be the more readily implied where the conduct of the party resisting the implication has induced the other to do work or expend money on the faith of a state of things existing under the supposed new agreement but non-existent under the old, and, even if no such agreement can be implied, the conduct may be of such a nature as to raise an equity against the party resisting. It is not necessary to speak of fraud or intentional misleading. It is either the case of a sub-contract, or it is an application of the principle enunciated by Lord Cairns in *Hughes* v. *Metropolitan Ry. Co.* (3) In that case notice to repair within six months was given by a landlord; negotiations for a sale of the reversion ensued, which fell through three days before the six months expired; the landlord served ejectment on the expiration of the three days, but was restrained in equity. Lord Cairns says (4): "There had been a notice in October to repair in six months. The effect of the letter of November, as it seems to me, was to propose to the appellant, and the further letter of the appellant had the effect of an assent by the appellant, to suspend the operation of that notice in order to enter upon a negotiation for the purchase and sale of the lease. That negotiation was entered upon, and, as I have assumed, came to an end on December 31. My Lords, it appears to me that in the eye of a Court of

(1) (1824) T. & R. 496, 523; 24 R. R. 108.
(2) (1865) 3 D. J. & S. 162.
(3) 2 App. Cas. 439.
(4) 2 App. Cas. 447.

Equity, or in the eye of any Court dealing upon principles of equity, it must be taken that all the time which had elapsed between the giving of the notice in October and the letter of November 28 was waived as a part of the six months during which the repairs were to be executed, and that all the time from November 28 until the conclusion of the negotiations, which I have assumed to be on December 31, was also waived—that it was impossible that any part of that time should afterwards be counted as against the tenant in a six months' notice to repair." Then he says (1): "It was not argued at your Lordships' bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. My Lords, I repeat that I attribute to the appellant no intention here to take advantage of, to lay a trap for, or to lull into false security those with whom he was dealing; but it appears to me that both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months dating from the month of October should afterwards be measured out as against the respondents as the period during which the repairs must be executed." Nothing turned upon any equitable doctrine of relief against forfeiture, but the House considered that, either by agreement or by innocent misrepresentation, the landlord was prevented from enforcing his right under the lease. In the case before me the

(1) 2 App. Cas. 448.

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plaintiff was busying himself, under the clause of the contract, to obtain purchasers for the various patents, and was in constant communication, by letter and telegram, with the defendant, who was himself desirous of getting speedy sales in order to obtain cash, so much so that he induced the plaintiff, somewhat against his will, to allow him (the defendant) to try and sell the Italian patent whilst he was in Italy. On March 7, 1903, the defendant wrote to the plaintiff mentioning April 1, "which is only three weeks off," as the date for the payment of the purchase-money, and suggesting that this would give the plaintiff or his agent full time to sell the Austrian and German patents, and in other respects asking him to continue to act under the agreement on the footing that it lasted until the end of the month. On March 17, the day after the six lunar months expired, the plaintiff telegraphed for defendant's assent to a sale of the German patents and received it on the same day. On the 20th there is a telegram and a long letter relating to others of the patents, replied to by the defendant. On March 23 the plaintiff writes that the duration of his option will expire in a few days and asks for two months' extension, as he would otherwise have to borrow the money to complete. On the 23rd, 24th, and 25th letters and telegrams pass between plaintiff and defendant on the subject of sales of the Swiss and other patents. On the 27th the defendant telegraphs: "No extension until I see you"; and on the 28th the plaintiff telegraphs: "Have money ready to carry out option in exchange for documents. When can I see you?" On April 6 and 7 the plaintiff and defendant had interviews, at which they tried to settle the accounts between them; but in no letter and at no time before action did the defendant even suggest that the option had expired on March 16. The contention is put forward for the first time by counsel at the bar, avowedly without regard to the defendant's own view. In my opinion the letters of March 7 and March 23, coupled with the intermediate and subsequent acts of the parties, are evidence of consensus ad idem, namely, that the option should extend to the end of the month of March. Even if no actual agreement could be inferred, the letter of March 7, coupled with the expenditure

of time, work, and money by the plaintiff consequent thereon and resulting therefrom—in the belief, as appears from the letter of March 23, that the option extended until the end of the month—operates in equity to prevent the defendant from asserting that the option expired on March 16, just as the letters in *Hughes* v. *Metropolitan Ry. Co.* (1) were held to operate to prevent the appellant from enforcing his legal right of entry. It is not necessary (as is also pointed out in that case) to find fraud—innocent misrepresentation, if effectual, will raise the equity. Here no fraud is alleged, and not only do I see no ground for supposing that the defendant had any intention, or even idea, of inducing the plaintiff to give his work and time for nothing, knowing that the option had expired, but I am convinced from the evidence that both parties treated, and intended to treat, the option as open until the end of the month.

There is no other conceivable reason for the continuance of the plaintiff's efforts to sell and of his frequent communications with the defendant on the subject. It is not open to the defendant to suggest that this might have been done for the sake of the 20 per cent. under the clause in the contract, for this provision expired with the option, and great part of the work was done subsequently; and, moreover, the defendant, by his counter-claim, denies any right in the plaintiff to retain any of this percentage for work done at any time, and claims repayment, and he adhered to this claim in the box. I hold, therefore, that the option extended to the end of March, and on this view the next question does not arise, but, as the point was fully argued, I will express my opinion on it, assuming that the option expired on March 29. The facts are these. On March 22 the plaintiff telegraphed for the defendant's address, and on March 23 wrote the letter to which I have already referred. The defendant received this letter on the 26th, on which day he left Rome for Genoa, and telegraphed from Rome to the plaintiff: "Hotel Gênes, Genoa, Friday—Paris, Monday." On Saturday the 28th the plaintiff telegraphed to the defendant at Genoa exercising his option under

(1) 2 App. Cas. 439.

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the agreement, but before the telegram arrived the defendant left for Monte Carlo, and proceeded to Paris on Sunday, arriving on Monday, the 30th. The plaintiff wrote a letter on March 28 confirming his telegram and exercising his option, and posted it on the 28th, addressed to the defendant in Paris. This letter would arrive in due course on the 29th, but the defendant did not reach Paris till the 30th. It is now argued that this option, having expired on March 29, a telegram and letter sent on the 28th, but not reaching the defendant until the 30th, were too late. In my opinion this contention fails also, for the option was duly exercised when the telegram was sent and the letter posted. I take the rule as stated by Lord Herschell in *Henthorn* v. *Fraser* (1): "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted." In the present case the parties are American citizens staying temporarily at London hotels when they signed the contract. That contract obviously contemplates the events that in fact happened—that the two parties would separate and would visit various parts of Europe, and would communicate with one another constantly by letter and telegram. If there ever was a case in which the parties contemplated that "the post might be used as a means of communicating" on all subjects connected with the contract, this is that case. I hold, therefore, that the option was duly exercised.

I have already disposed of the point as to the Italian patent. In fact the defendant has sold it, and therefore cannot make a title to the plaintiff. The parties have agreed its value at 2000*l.*, and the Italian patent must be omitted from the judgment and the purchase-money reduced by 2000*l.* The plaintiff must pay the 6000*l.* and take over the deferred payments in respect of two of the patents which have been sold, but he is not bound to pay until the defendant assigns to him all the patents (except the Italian) which have not already been assigned to purchasers on sales under the powers in the

(1) [1892] 2 Ch. 33.

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contract. The defendant has not yet fully performed his part of the contract by procuring patents in all the countries. There must be a declaration that the plaintiff is entitled to specific performance of the contract, and that the defendant is bound to obtain and assign the outstanding patents on payment of 6000*l.*, less the 800*l.* already paid on account of the Russian patent. The defendant must pay the costs of the action, and the counter-claim is dismissed with costs.

Solicitors: *W. O. Vizard; Paterson, Candler & Sykes.*

J. R. B.

BUCKLEY J. 1903 Oct. 28.

In re HAY.
KERR *v.* STINNEAR.

[1902 H. 3720.]

Will—Unattested Alteration—Confirmation by Codicil—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 21.

A testatrix by her will, dated February 1, 1901, gave many legacies, including legacies (*a*) 200*l.* to C., (*b*) 500*l.* to M., and (*c*) 3000*l.* to S.

On October 19 her servant, by her direction, struck out the three legacies. On October 21, 1901, testatrix executed a codicil referring to her will as of February 1, 1901, and thereby revoked legacy (*b*), but did not refer to the other two legacies, and concluded by ratifying and confirming the will in other respects.

Held, that only legacy (*b*) was revoked.

MARIANNE LOUISA HAY made her will, dated February 1, 1901, and thereby appointed three persons as trustees and executors thereof, and (after referring to a will of her late husband and a power of appointment therein which she declared she did not exercise) she gave all her real and personal property (except any portions which she should otherwise dispose of by any codicil or codicils to her said will) to her trustees upon trust for sale and conversion, and stand possessed of the proceeds and her ready money, "Upon trust to pay the legacies following: To the Cheltenham General Hospital, out of my pure personal estate, free of duty, and in priority to any other legacies given by this my will, 500*l.* To Mrs. Phillips

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Becker . . . . 500*l.* To Mrs. Blanche Wemyss Manley . . . . 500*l.* To Miss Frances Jennings . . . . 500*l.* To Miss Sophia and Miss Henrietta Jennings . . . . 200*l.* each. *To Miss Christina Stewart of Orich, Nether Loch Aber,* 200*l.* To the four Misses Boissier . . . . 100*l.* equally to be divided between them. To Miss Dora Podmore . . . . 50*l.* To Dr. Gooding . . . . 100*l.* *To Miss Elizabeth McKenzie, daughter of Colonel John McKenzie, who at one time held* command at Tynemouth Castle, 500*l.* To each of my executors who shall prove my will, 500*l.* To Frank Tweedie . . . . 100*l.* To *Mrs. Stinnear, of Oxford Terrace, Christ Church, New Zealand, 3000l.*"

After giving further legacies, the testatrix directed her trustees to stand possessed of the residue of her property upon trust to divide the same among charitable institutions.

After February 1, 1901, and before October 19, 1901, the testatrix executed two codicils (the terms of which are not material) to her will.

On October 19, 1901, the testatrix directed Emily Miles to cross out the legacies to Miss Stewart, Miss McKenzie, and Mrs. Stinnear, and Emily Miles in obedience to this direction drew a pen through the words which are above printed in italics. The obliterations were not signed or initialled by the testatrix or attested.

The testatrix executed a third codicil, dated October 21, 1901, which, so far as material, was as follows: "This is a third codicil to the last will and testament of me Mrs. Marianne Louisa Hay . . . . and which will bears date the 1st day of February, 1901. [The dates of the other codicils were here stated.] I revoke the legacy of 500*l.* which I have given to Miss Elizabeth McKenzie, daughter of Colonel John McKenzie, who at one time held a command at Tynemouth Castle. [Various other legacies were then given.] In all other respects I ratify and confirm my said will and two codicils."

The testatrix died on December 28, 1901, and probate was granted of the will (in facsimile) and of the three codicils.

An affidavit of Emily Miles, the housemaid of the testatrix, was incorporated with and formed part of the probate. Paragraph 3 of this affidavit contained the following statement:

"On Saturday, October 19 [1901], the said Marianne Louisa Hay asked me to read her will to her. I often did so. When I had read it to her up to the legacy of Miss Christina Stewart of Orich, Nether Loch Aber, 200*l.*, she said, '. . . . I do not want to leave her any money.' I tried to persuade her not to do anything, but she insisted . . . . She said, 'Cross it out.' So I crossed out the words, 'To Miss Christina Stewart of Orich, Nether Loch Aber.' When I got to the legacy to Miss Elizabeth McKenzie, she said, 'I do not want to leave her anything because I am buying her an annuity.' She said, 'Cross it out,' and I crossed out the words 'To Miss Elizabeth McKenzie, daughter of Colonel John McKenzie, who at one time held.' Then, when I got to the legacy to Mrs. Stinnear . . . . she told me to cross that out, and I crossed out the words "Mrs. Stinnear of Oxford Terrace, Christ Church, New Zealand, 3000*l.*' I then read the remainder of the will to her."

An originating summons was taken out by the executors and trustees for the determination by the Court of (amongst other things) the question whether the legacies in favour of Margaret Stinnear and of the other persons originally named in the will, but whose names were obliterated therefrom by her direction, were under the circumstances valid legacies, payable to the legatees. An affidavit of the solicitor who prepared the will and the third codicil stated that the provisions of the third codicil were discussed by himself and the testatrix in very considerable detail, but that although she instructed him to revoke the legacy of 500*l.* to Miss McKenzie, she did not refer to the legacies to Miss Stewart or Mrs. Stinnear; and that for the purpose of preparing the codicil he did not inspect the original will, as he possessed a copy or draft of it, and was unaware of the obliterations in it.

Birrell, K.C., and *H. B. Howard*, for the applicants.

Astbury, K.C., and *T. T. Blyth*, for Mrs. Stinnear. The will as originally executed—that is to say, without alteration—was confirmed by the codicil. Where revocation was to take place she expressly revoked the gift, as in the case of Miss

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McKenzie's legacy. That unattested alterations were intended to be final and not merely deliberative requires strong evidence: *In the Goods of Hall* (1); *In the Goods of Heath.* (2)

W. Finlay, for Miss Stewart.

R. J. Parker, for the Attorney-General. The rule laid down in *In the Goods of Hall* (1) applies only where the Court is satisfied that the alterations were intended to be merely deliberative. A will is confirmed when the whole of what purports to be a will—not merely so much of a document as is strictly a will under the Wills Act—is confirmed.

Effect is given to alterations in a will although they are unattested, where the will is confirmed by a codicil: *Tyler* v. *Merchant Taylors' Co.* (3) The question is really whether the will, or the document which is not legally a will, is confirmed. The circumstances here shew that the alterations were intended to be final, and that the document embodying them was confirmed.

BUCKLEY J. Sect. 21 of the Wills Act, 1837, says: "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will." The testatrix made her will on February 1, 1901, and thereby she gave 200*l.* to Christina Stewart, 500*l.* to Elizabeth McKenzie, and 3000*l.* to Mrs. Stinnear. Before October 19, 1901, the testatrix made two codicils to her will, and on that day the conversation took place between her and Emily Miles which is stated in paragraph 3 of an affidavit made by Emily Miles. The result was that Emily Miles drew a pen through the names and descriptions of the three legatees. Two days afterwards the testatrix made another codicil. It commences with the words, "This is a third codicil to the last will and testament of me Mrs. Marianne Louisa Hay," and states that that will "bears date

(1) (1871) L. R. 2 P. & M. 256. (2) [1892] P. 253.
(3) (1890) 15 P. D. 216.

the 1st day of February, 1901." After a reference to her first and second codicil the testatrix says: "I revoke the legacy of 500*l.* which I have given to Miss Elizabeth McKenzie, daughter of Colonel John McKenzie, who at one time held a command at Tynemouth Castle"—that is one of the three legacies I have referred to—and concludes with these words: "In all other respects I ratify and confirm my said will and two codicils."

On the section I have read it is quite plain that an alteration in a duly executed will made after the execution thereof is not effective unless the alteration is executed in the manner required by the statute for the execution of the will. I have to see, therefore, whether by her third codicil this testatrix has confirmed, not the will as validly executed, but the will as altered, with the result that the alteration is by the execution of the codicil now executed in manner required for the execution of a will. That is a question of construction. I have to read the third codicil, and say what it is that the testatrix thereby confirms. The thing which she confirms, by a duly executed codicil, may be either an attested or an unattested document. The third codicil being a duly attested instrument, whatever it is that she confirms by it will become her will. The question then is one of construction. What did she mean by "my will"? She begins by referring to her will as bearing date February 1, 1901. That was the unaltered will. It is, I think, the will without alterations which she confirms.

I need not, however, found my decision on that ground only. The third codicil expressly revokes the legacy of 500*l.* to Miss Elizabeth McKenzie, and the testatrix therefore treats the will as containing that legacy—which with the other two legacies had been crossed out—as still good, and revokes Miss McKenzie's legacy, but not the other two.

It is unnecessary for me to consider the decisions which have been referred to, and which are said to have rested on the circumstance that in some of the cases the alterations were regarded as deliberative and in the others as final. All these are, I think, capable of being reconciled with the view which I take, that it is in each case a question of construction

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what is the instrument which the testator by his codicil intends to confirm. Here in my judgment the duly executed and attested will was confirmed, and no effect can be given to the unattested alterations. Under the will the three legacies were good. One of them was revoked by the third codicil, and the other two remain, and are now payable.

Solicitors for trustees: *Field, Roscoe & Co., for Bubb & Co., Cheltenham.*

Solicitors for Mrs. Stinnear: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for Miss Stewart: *Markby, Stewart & Co.*

Solicitor for Attorney-General: *Solicitor to the Treasury.*

F. E.

BUCKLEY J. 1903 *Oct.* 29, 30, 31.

In re STEPHENS. KILBY *v.* BETTS.

[1900 S. 4470.]

Will—Construction—Remoteness—Accumulations of Income—Portions—Gift to Children as a Class—Period of Ascertainment—Accumulations Act, 1800 (39 & 40 *Geo.* 3, *c.* 98), *s.* 2.

A testator, who died in March, 1888, directed that his trustees should out of the income of his residuary estate set apart a yearly sum of 24*l.*, "while and so long as there shall be a child of my daughter S. A., the wife of H. B., for the time being under the age of twenty-one years, subject as hereinafter mentioned," invest the same and accumulate the income thereof, and should hold the aggregated and accumulated fund in trust for such of the children of his daughter S. as being sons should attain twenty-one, or being daughters should marry, in equal shares, the shares to be vested interests and to be paid and payable in the case of a son at twenty-one, and in the case of a daughter at twenty-one or marriage. Subject as aforesaid, the testator directed the trustees to pay the income of his residuary estate to S. for life, and after her death to her husband H. for life; but he directed that if S. should survive H. the trustees should during the rest of her life pay her the whole income of his residuary estate, and should no longer set apart the annual sums (without prejudice to the sums already set apart and invested and the income thereof).

S. and H. survived the testator and had five children, three of whom were born in the testator's lifetime, and two after his death. The eldest

child was born in 1882, and attained twenty-one in 1903, and the youngest was born in 1896, and would not attain twenty-one until 1917:—

Held, (1.) that the period prescribed for aggregation and accumulation (subject to earlier cesser by the death of H. in the lifetime of S., and to later cesser by the birth of other children) was, so long as there was a child of S. under twenty-one, whether it was born before or after its eldest brother or sister attained twenty-one—namely, until 1917.

(2.) Following *Beech* v. *Lord St. Vincent*, (1850) 3 De G. & Sm. 678, that the accumulated fund was a "portion" within the meaning of s. 2 of the Thellusson Act, and the direction to accumulate was valid.

(3.) That the class of children to take was not closed when the eldest child attained twenty-one, but only at the end of the period for accumulation, and that the accumulated fund was not until then divisible.

Watson v. *Young*, (1885) 28 Ch. D. 436, followed.

In re Wenmoth's Estate, (1887) 37 Ch. D. 266, commented on.

CHRISTOPHER STEPHENS died on March 4, 1888, having made a will dated February 11, 1886.

By his will the testator gave his realty and personalty to trustees upon trust to sell and convert the same into money, to invest the proceeds, and to stand possessed of the income of his residuary moneys and the investments thereof upon trust, after payment of his debts and funeral and testamentary expenses, "to set apart" out of the income of his residuary moneys and the investments thereof "the sum of 24*l.* a year while and so long as there shall be a child of my daughter Sarah Alice, the wife of Henry Betts, for the time being under the age of twenty-one years, subject as hereinafter mentioned." And the testator thereby directed the trustees to invest the said sum of 24*l.* a year, and that they should stand possessed of the same investments and the income thereof, and "accumulate the same by adding the same income to such investments as accretions thereto during the infancy of such children of my said daughter, or so long as my trustees and trustee are by this my will directed to continue to set apart the said sum of 24*l.* a year. And I declare that my said trustees shall stand possessed of the moneys so set apart by them out of the dividends, interest, and annual income of my said residuary moneys and estate by sums of 24*l.* a year in accordance with the trusts hereinbefore declared, and the dividends, interest,

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and income thereof and the accretions thereto, in trust for such of the child or children of my said daughter who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall marry, and if more than one in equal shares, and the share and shares of such child and children to be vested interests in him, her, or them, and to be paid and payable to them, in the case of a son or sons when and as they respectively attain twenty-one years of age, and in the case of a daughter or daughters when and as she shall attain twenty-one years of age or marry, and if there shall be but one such child then the whole for such one child only." Subject as aforesaid, testator gave the income of his residuary estate upon trust for Sarah Alice Betts for life, and after her death upon trust for Henry Betts for life, if he should survive her. The will continued as follows: "But in case my said daughter Sarah Alice Betts shall survive the said Henry Betts, then I direct that my said trustees shall pay to the said Sarah Alice Betts during the then remainder of her life the whole of the future interest, dividends, and income of my said residuary moneys"—and the investments thereof—"and shall not set apart for any then longer period the said sum of 24*l.* a year therefrom, but without prejudice to the sums of 24*l.* a year which shall then have already been set aside and invested as aforesaid, and the income thereof, but subject to the obligation of maintaining and educating such of her children as being sons shall be under the age of twenty-one years, and being daughters shall be under that age and spinsters." And the testator directed that on the death of the survivor of Sarah Alice and Henry Betts his trustees should stand possessed of his residuary estate in trust for all such of the children of Sarah Alice as should be living at her death, and the child and children then living of any child or children of Sarah Alice who should have died in her lifetime as being male "attain the age of twenty-one years, or being female attain that age or marry under that age, if more than one in equal shares per stirpes, so that the children of my said daughter who shall be objects of this trust shall take in equal shares, and the children being objects of this trust of any child of my said daughter who shall have died

shall take equally between them the share which their parent would have taken had he or she survived my said daughter."

The six children of Sarah Alice and Henry Betts were Ethel Alice (who was born August 26, 1880, and died May 1, 1881), Frederick Charles (who was born June 19, 1882), Beatrice Anne (who was born July 1, 1885), Reginald (who was born January 27, 1888), Dorothy (who was born September 27, 1891), and Marjorie (who was born November 1, 1896).

The trustees took out an originating summons asking for the determination of the following questions arising on the will: (1.) Whether the direction to set apart and accumulate the 24*l.* a year was void to any and what extent, and, if so, who was entitled to the money already accumulated and to the annuity for the remainder of the period during which the will directed payment and accumulation. (2.) Whether it was the trustees' duty to continue to set apart the 24*l.* while there was a child under twenty-one, having regard to the declaration that the shares of the children were vested and payable at twenty-one in case of sons, and at that age or on marriage in case of daughters, and whether the trust for accumulation ceased on the eldest child attaining twenty-one being a son, or being a daughter attaining twenty-one or being previously married.

Kenyon Parker, for the trustees, and Sarah Alice and Henry Betts. Having regard to the exception as to portions in s. 2 of the Accumulations Act, 1800, and to *Beech* v. *Lord St. Vincent* (1), I do not wish to contest the validity of the direction to accumulate. [He also referred to *In re Knapp's Settlement* (2), and, as to ascertaining the class, to Theobald on Wills, 5th ed. pp. 279, 280.]

Douglas, for Frederick Charles, Beatrice Anne, and Reginald, the three grandchildren of the testator who were born in his lifetime. The accumulation is to continue until the youngest child for the time being attains twenty-one, or until Henry Betts' previous death in his wife's lifetime. The period for ascertaining the class was fixed when the first interest vested: *In re Wenmoth's Estate* (3); *Andrews* v. *Partington*. (4)

(1) 3 De G. & Sm. 678.
(2) [1895] 1 Ch. 91.
(3) 37 Ch. D. 266.
(4) (1791) 3 Bro. C. C. 401.

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When Frederick Charles Betts attained twenty-one he became entitled to receive one-fifth of the accumulations, and he is entitled to receive one-fifth of the annual sum of 24*l.* until the period of accumulation ends.

Duka, for the two other children. The direction to set apart and accumulate is valid for the whole of the period pointed out. The testator intended to provide portions within the meaning of s. 2 of the Act, and the direction to accumulate, therefore, is not within s. 1: *Beech* v. *Lord St. Vincent.* (1)

The rule of convenience in *Andrews* v. *Partington* (2) is inapplicable where the period for accumulation is to extend beyond the time when the first interest becomes vested: *In re Knapp's Settlement* (3); *Watson* v. *Young* (4); *In re Emmet's Estate.* (5) [He also referred to *Jones* v. *Maggs* (6); *Griffiths* v. *Vere* (7); Tudor's Real Property Cases, 3rd ed. p. 515.]

Cur. adv. vult.

Oct. 31. BUCKLEY J. The first question to be determined is, What is the period during which the testator has directed the aggregation and accumulation of these annual sums of 24*l.* to continue? It seems to me that he has expressed it quite plainly—it is to be so long as there shall be "a child of my daughter Sarah . . . . for the time being under the age of twenty-one years." It does not matter whether that child is born before or after its eldest brother or sister attains twenty-one. If it be a child of Sarah and be under twenty-one, the time specified for the aggregation and accumulation has not expired.

To shew how that applies I will refer to some of the dates. The testator died on March 4, 1888. A child of Sarah had been born and had died before 1888, and may therefore be disregarded. At the testator's death three children only of Sarah were in existence, namely, Frederick, Beatrice, and Reginald, who were born in 1882, 1885, and January, 1888,

(1) 3 De G. & Sm. 678.
(2) 3 Bro. C. C. 401.
(3) [1895] 1 Ch. 91.
(4) 28 Ch. D. 436, 445.
(5) (1880) 13 Ch. D. 484, 490.
(6) (1852) 9 Hare, 605, 607.
(7) (1803) 9 Ves. 127.

respectively. The eldest child, Frederick, attained the age of twenty-one on June 19, 1903. In the interval, namely, in 1891 and 1896, were born other two children, Dorothy and Marjorie. Twenty-one years from Marjorie's birth will not expire until 1917. In my judgment the testator has directed the aggregation and accumulation of these annual sums until 1917, and if there should hereafter be another child of Sarah the period may be longer. That period is liable to be shortened by the happening of another event—the death of Sarah's husband in her lifetime. If that event does not happen, the period for aggregation and accumulation is, in my judgment, 1917, or the later date at which any future child of Sarah attains the age of twenty-one years.

The next question is whether that direction is in breach of the Accumulations Act, 1800. It is quite obvious that the period prescribed by the will is not such a period as is allowed by s. 1 of the Act. Is it within any of the excepted cases protected by s. 2? It is protected if it is a provision for raising portions for children of any person taking an interest under the will. Sarah does take an interest under the will, and these children are therefore children of a person taking such an interest. It remains for consideration whether the benefits directed to be taken by the children are "portions" within the meaning of s. 2.

Now the meaning of the word "portion," as generally understood, is a sum of money secured to a child out of property either coming from or settled upon its parents. The benefit is none the less a portion because it is given to all the children, including the eldest child, and not to younger children only. The question to be answered is whether the benefit to be taken by the children or some of them comes from their parents, or out of property in which their parents take an interest. If that is a correct description of the word "portion," this direction as to accumulation is within it. Authority on the point is to be found in *Beech* v. *Lord St. Vincent* (1), and I find no substantial point of difference in fact between this case and that, except that in *Beech* v. *Lord St. Vincent* (1) the

(1) 3 De G. & Sm. 678.

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eldest son was excluded. In my judgment that difference—that here all the children, and not merely the younger children, are to take—does not prevent the benefits to the children from being portions. In my judgment the case is within the exceptions protected by s. 2 of the Act of 1800.

The next question is whether the class of children entitled to take was ascertained and closed on June 19, 1903, when the eldest child attained the age of twenty-one. Now the rule laid down in *Andrews* v. *Partington* (1) has been repeatedly stated to be a rule merely of convenience. When the rule is adopted the solution arrived at is the result of an endeavour by the Court to reconcile two apparently inconsistent directions—the one that the whole class of children shall take, and the other that the fund shall be divided at a moment when the whole class cannot be ascertained. The Court has cut that knot by closing the class at the date at which the first child is to take.

But, as I shall shew from decided cases, the rule is never applied unless it is necessary. Where it is unnecessary to resort to it, you give effect to the disposition as it is, and directly you find, as you do find in this case, that there is a direction to accumulate after the date at which the eldest child attains twenty-one—that is to say, where the fund to be divided is a fund to be aggregated and accumulated after that date, so that the divisible fund is not known at that date—you are driven to the conclusion that the child who first attains twenty-one cannot have that which is apparently given to him at that date, because the sum to be divided is not then known. Therefore, where you find a direction to accumulate to a later date, the rule in *Andrews* v. *Partington* (1) does not apply. The same thing may be expressed in a different way, thus: The direction to accumulate until 1917 is inconsistent with a division in 1903: you cannot accumulate until 1917 if you divide in 1903. The direction to pay at twenty-one must be read as meaning that the payment is to be made at the expiration of the period of aggregation and accumulation or at twenty-one, whichever last happens. In other words, it means that you are not to pay before twenty-one, not that you are to pay

(1) 3 Bro. C. C. 401.

at twenty-one, in disregard of the fact that the period for aggregation and accumulation has not expired.

The cases mentioning them shortly are, first, *In re Emmet's Estate* (1), in which the rule was applied. It was an ordinary case; there was no direction for aggregation and accumulation until a later date. The children were to be paid at twenty-one, and it was held that the rule in *Andrews* v. *Partington* (2) was to be applied, because you could not pay at twenty-one a share of an ascertained sum unless you knew among how many people it was to be divided. Therefore you must close the class and determine the number of persons among whom the division was to be made.

The next case is *Watson* v. *Young* (3), which is almost exactly the present case. The gift there was to one person for life, and after his death to his children who should attain twenty-one, and the issue of children who should die under twenty-one leaving issue who should attain twenty-one, with a proviso that the rents of the trust premises should, during the term of twenty-one years from the day next before the day of the testator's death, be accumulated by way of compound interest, and the accumulated fund should be held in trust for the child, if only one, or all the children equally, if more than one, of R. who should attain twenty-one. It was held that all the children of R. who were born during the period of accumulation and who attained twenty-one were entitled to take. Pearson J., who decided the case, said (4): "But, in the present case, where there is an accumulation directed, and no one can, therefore, enter into the actual enjoyment of his share until the period of accumulation has come to an end, I do not see that there is any consideration of convenience, or of lesser inconvenience, which obliges me to shut up the class until the period of accumulation comes to an end."

In re Wenmoth's Estate (5), decided by Chitty J., is, as reported, a decision that the rule as to closing the class does not apply to gifts of income. I cannot think that the case is satisfactorily reported. To point out my difficulties I must

(1) 13 Ch. D. 484, 490.
(2) 3 Bro. C. C. 401.
(3) 28 Ch. D. 436.
(4) Ibid. 445.
(5) 37 Ch. D. 266.

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mention a few dates. The testator died in 1871, and the eldest grandchild attained twenty-one in 1883. The directions of the testator were that the shares of the grandchildren in the income were to be invested by the trustees during the minority of the grandchildren and form part of the trust. So that from 1871 to 1883 the shares of the income were to be invested, and in 1883 there was an aggregate sum resulting from so doing. At that moment there were seven grandchildren. Four years later, in 1887, an eighth child was born. It is obvious that in 1883, when the first grandchild attained twenty-one, the question arose, Was he entitled to one-seventh of the income which had accumulated during the period, and thenceforward to one-seventh of the income, or was he not? And, further, when the eighth grandchild was born in 1887, was the eldest still entitled to a seventh of the income, or was his share of it cut down to an eighth? Chitty J. held that the eighth grandchild took. If so, did he take a share in the income which was there in 1883, and in that which accrued from 1883 to 1887, or did he not? Was the division in sevenths until 1887, when he was born, and after that in eighths, or what was done? Obviously these were questions of difficulty which required decision. Chitty J. is reported as having said (1): "Where, however, as in this will, the distribution is of income and not of corpus there is nothing which requires the application of the rule"—of convenience—"and the difficulty does not arise." I confess I do not understand that; it seems to me that the difficulty does arise, and that it can only be got over by a subsequent sentence in the judgment of the learned judge, which, if I understand it rightly, makes the matter plain. He says a little further down: "Each member of the class, as soon as he becomes entitled, takes his share of the income, and there is no reason why the rule should be applied beyond each periodical payment." If the two sentences are read together and construed as a decision by the learned judge that as each periodical payment falls due it is to be divided upon the then existing state of things, that is to say, in sevenths, and that when another periodical payment has fallen due, after another grandchild has been born, it is to

(1) 37 Ch. D. 270.

be divided in eighths, I understand it. But according to the minute of the order as set out in the report, the declaration was that the income was divisible into eight parts—not that after the birth of the eighth child the income was divisible in eighths, but that all the income was so divisible. I can only suppose that the decision of Chitty J. was asked only on the question how the income which accrued after the birth of the eighth grandchild was to be divided. If that was the case, the matter becomes plain; if not, I confess that I have great difficulty in understanding the decision.

The last case which was referred to is *In re Knapp's Settlement* (1), where it was held that the class closed. There was not, in that case, any direction to accumulate. North J., referring to *Watson* v. *Young* (2)—a case which seems to me to govern the present case—distinguishes it from the case before him, and points out the ground of the decision. I adopt his view. He says (3): "Although"—in *Watson* v. *Young* (2)—"the tenancy for life had expired, a further term had to elapse during which the rents had to be accumulated, and till that period came to an end there could be no distribution, and therefore in that case the period for distribution and fixing the class was not the death of the tenant for life, but the expiration of the further period that had to run to make up the twenty-one years." Directly you have, as here, a direction to aggregate and accumulate for a further term, in my judgment the rule in *Andrews* v. *Partington* (4) does not apply.

I hold, therefore, that (subject, of course, to any earlier cesser by the death of Henry in Sarah's lifetime) the aggregation and accumulation of the sums of 24*l.* must be continued for the period named by the testator—namely, while and so long as there shall be any child of Sarah for the time being under the age of twenty-one years—and that the fund is not divisible until that period of accumulation has expired.

Solicitors for all parties: *A. H. Arnould & Son*, for *Kilby & Collinge, Banbury.*

(1) [1895] 1 Ch. 91.
(2) 28 Ch. D. 436.
(3) [1895] 1 Ch. 97.
(4) 3 Bro. C. C. 401.

F. E.

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In re RICHARDSON. PARRY *v.* HOLMES.

[1902 R. 1967.]

Will—Cy-près Doctrine—Perpetual Life Estates—Stirpital Distribution.

A testator, who died before the Wills Act was passed, by his will gave real estate to his children C., G., and M. (without any words of limitation), and declared that they and the survivors of them should stand seised thereof in trust to retain the income thereof for their own benefit in equal shares during their natural lives; but the will contained a proviso that if any of such children should die unmarried, or, being married, without leaving a child, his or her share should accrue to the surviving child or children, equally if more than one, and that the last survivor of the three children should take all the estate devised. The will continued as follows: "But in case such son or daughter so dying shall leave issue at his or her decease . . . . the share of such child so dying to go and be divided equally amongst his or her child or children . . . . for life, share and share alike if more than one, and if but one then the whole share to such only child for life . . . . and so to be continued and distributed in a descending line per stirpes from issue to issue for life so long as any issue shall be living descended from my said children, the children of the parent dying taking parent's share equally between them in all cases of decease." The will contained no gift over in case of default of issue.

G. died in 1856 a bachelor and intestate.

C. died in 1874 leaving one child only, R.

M. died in 1890 without issue, but having devised her real estate to R., who executed a disentailing deed.

It was admitted that only half of the property passed to M. as the survivor of the three children:—

Held, that neither C. nor R. took an estate tail in the other moiety according to the cy-près doctrine, but that on the death of R. there was an intestacy, and that this moiety belonged to the testator's heir.

Mortimer v. *West*, (1828) 2 Sim. 274; 29 R. R. 104, distinguished and commented on.

THIS action was commenced by Mary Josephine Parry, claiming to be administratrix of Augusta Ann Holmes Richardson, against William Holmes, who claimed to be her heir-at-law, to have it determined (amongst other things) what persons were entitled to her real and personal estate, and to ascertain the real estate to which she was entitled at the time of her death.

Inquiries were directed as to who was the heir and what was the real estate, and on the evidence in answer to the former inquiry the master made a note that the evidence shewed that Harold C. Richardson was the heir of the intestate. He was accordingly joined as a defendant and entered an appearance. In order to answer the other inquiry the Court was asked to construe the will of one William Holmes, deceased, below called "the testator," and at the hearing of the summons on this point the defendant William Holmes was appointed to represent the testator's heir.

The testator died on March 7, 1835, leaving a will dated November 11, 1832, and (omitting a son called Francis Henry, who died without issue in 1852, and took no interest under the will except a legacy of 1*s.*) three children called Caroline Augusta Holmes, George Felix Holmes, and Mary More Holmes.

The testator by his will gave to the three children (without any words of limitation) certain freehold lands and buildings at Kentish Town, in the county of Middlesex, "To hold the same upon the following trusts, and to and for the intents and purposes and under and subject to the provisoes hereafter by me mentioned and declared of and concerning the same." The will continued as follows: "And I do hereby declare, and my will and mind is, that my said children Caroline Augusta, George Felix, and Mary More Holmes, and the survivor or survivors of them, shall and do stand respectively seised, possessed of, and interested in all and singular my said freehold estates according to the nature and quality thereof respectively, and every part and parcel thereof, upon the several trusts nevertheless and to and for the several intents and purposes next hereinafter by me expressed and declared of and concerning the same, that is to say: Upon trust to pay, satisfy, and discharge all my just debts, funeral expenses, the costs and charges of proving this my will, and all other incidental expenses whatsoever, and likewise the legacy of one shilling to my son Francis Henry Holmes, in trust from time to time as the rents, issues, profits, and income of all and singular my said

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real estates shall be received, to retain the same for their own proper use and benefit in equal shares and proportions during the term of their natural lives, but the shares or proportions of either of my daughters in the said rents, issues, profits, and income shall be for their sole and separate use and benefit free and absolutely independent of and from the control, order, debts, engagements, or incumbrances of any husband or husbands they or either of them may happen to marry. And also I declare that their receipt and receipts alone shall be a sufficient discharge or discharges to their co-executors and co-trustees for so much money as in such receipt or receipts shall be acknowledged or expressed to be received: Provided always and I do hereby declare that if any such of my said children shall depart this life unmarried, or being married without leaving any child or children, then the part or share of him, her, or them so dying shall go and accrue to the survivor or survivors of my said children, to be equally divided between them, if more than one, share and share alike, and that the last survivor of my said children shall stand and be possessed of all my said freeholds for his or her own absolute use and benefit, with full liberty and power to dispose thereof either by deed or will as his or her own absolute estate and effects; but in case such son or daughter so dying shall leave issue at his or her decease, whether before or after the age of twenty-one years, the share of such child so dying to go and be divided equally amongst his or her child or children, whether sons or daughters, for life, share and share alike if more than one, and if but one then the whole share to such only child for life, and to be paid and applied towards their maintenance and support during their minority, and so to be continued and distributed in a descending line per stirpes from issue to issue for life so long as any issue shall be living descended from my said children, the children of the parent dying taking parent's share equally between them in all cases of decease. And I further give and bequeath unto my said children Caroline Augusta, George Felix, and Mary More Holmes any personal estate and effects that I may be possessed of at the time of my decease; and I appoint them residuary legatees."

There was in the will no gift over in case of default of issue, and no gift of residue of real estate.

George Felix Holmes died in 1856 a bachelor and intestate.

Caroline Augusta Holmes in 1841 was married to Anthony John Richardson, and died on April 19, 1874. Her husband died in 1899. There were two children of this marriage, namely, the intestate, Augusta Ann Holmes Richardson, who died on April 24, 1902, and Josephine Mary Holmes Richardson, who died on April 6, 1873, a spinster and intestate.

Mary More Holmes on July 25, 1844, married Rowland Holmes, who predeceased her. She died on July 10, 1890, without issue, having by her will dated February 17, 1880 (and proved on April 15, 1891, by A. A. Holmes Richardson, her sole executrix), given all her real and personal estate unto and to the use of A. A. Holmes Richardson, her heirs, executors, administrators, and assigns respectively absolutely.

On July 14, 1892, Augusta A. Holmes Richardson executed a disentailing deed of all the hereditaments whatsoever and wheresoever and parts and shares thereof to which she was entitled for any estate in tail in possession legal or equitable.

After the death of Mary More Holmes in 1890, A. A. H. Richardson was until her own death in 1902 in undisputed receipt of the rents and profits of the whole of the property in Kentish Town except the portions of it which she sold.

The plaintiff was a paternal aunt of A. A. H. Richardson, who on October 3, 1902, obtained letters of administration to her estate as her sole next of kin.

The defendant William Holmes was a great-nephew of the testator William Holmes, and, so far as had been ascertained, appeared to be his heir-at-law.

At the hearing it was admitted (1.) that the words of the will were sufficient to pass the fee simple in the property, and (2.) that on the construction of the will and in the events which had happened only one moiety of the property passed to Mary More Holmes, the last surviving child.

Buckmaster, K.C., and *T. A. Herbert*, for the heir-at-law of A. A. H. Richardson. The only question remaining is what

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estate Caroline Holmes, and after her A. A. H. Richardson, took in one moiety of the property devised. It is contended on behalf of the heir-at-law of the latter that she was tenant in tail. There being by William Holmes' will a limitation of an indefinite series of life estates, in itself void as a perpetuity, the will ought to be construed as creating an estate tail by applying the cy-près doctrine.

The course of succession designated by the testator is allowed by law, but his directions are illegal, and the law, in order to prevent his intention from being entirely defeated, treats the limitation as of an estate tail: *Monypenny* v. *Dering*. (1)

It has sometimes been said that the doctrine does not apply where the only intention is to create successive life estates for ever, "but the point is not covered by authority. It is clear that the doctrine will not apply where the intention is only to create a limited number of life estates": Theobald on Wills, 5th ed. p. 533.

Where successive life estates were given by way of executory trust, the Court gave effect to the doctrine by directing a settlement limiting the estate to persons in existence for life, with remainder to the heirs male of their bodies in strict settlement: *Humberston* v. *Humberston*. (2)

The doctrine was applied where the will was almost precisely in the same words as the will in this case: *Mortimer* v. *West*. (3) The Court there relied on the fact that there was a gift over, shewing "an intention that the estates shall not go over until there is a general failure of issue," and distinguished *Seaward* v. *Willock* (4), where it had been held that the doctrine was inapplicable to the case of a mere succession of life interests. Modern cases shew that the absence of a gift over does not exclude the application of the doctrine to a case where there is an indefinite series of life estates. For instance, there is the dictum of Rolt L.J. that "the same result would be arrived at if we held it to be a perpetual succession of life estates" and then applied the doctrine of cy-près, which

(1) (1847) 16 M. & W. 418, 428.
(2) (1716) 1 P. Wms. 332.
(3) 2 Sim. 274; 29 R. R. 104.
(4) (1804) 5 East, 198.

would give the nephews an estate in tail male: *Forsbrook* v. *Forsbrook*. (1)

The doctrine of cy-près is not confined to wills of an executory character, but is a rule of construction, and applies when the testator's object is to give A. an estate for life, and A.'s eldest son a similar estate, and his eldest son a third estate for life, and so on: *Parfitt* v. *Hember* (2); *Hampton* v. *Holman*. (3)

Birrell, K.C., and *Harman*, for the defendant William Holmes. There is an intestacy as to Caroline's moiety, which now belongs to the heir-at-law of William Holmes, the testator.

The gift of perpetual life estates was void, and the cy-près doctrine has no application. The doctrine is stated in *Monypenny* v. *Dering* (4), and is inapplicable where an attempt is made simply to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite series of generations: Jarman on Wills, 5th ed. pp. 267, 270, 271. The dictum of Rolt L.J. in *Forsbrook* v. *Forsbrook* (1) and the case of *Mortimer* v. *West* (5) are the only authorities, if there are any, to the contrary. In *Mortimer* v. *West* (5) the presence of the gift over, absent here, brought about the decision. In *Forsbrook* v. *Forsbrook* (1) there were, as Lord Cairns pointed out, words which clearly indicated a series of inheritances and constituted words of limitation. Moreover, in that case there was no attempt at stirpital distribution. In *Mortimer* v. *West* (5) the Vice-Chancellor may have attached importance to the gift over, because before the Wills Act a devise to a person and his heirs, or to a person indefinitely, with a limitation over in case of his death without issue, conferred an estate tail: Jarman on Wills, 5th ed. p. 521.

Whether *Mortimer* v. *West* (5) was rightly or wrongly decided, the absence of the gift over in this case is sufficient to distinguish it from that case.

[They referred also to *Monypenny* v. *Dering* (6); *Somerville*

(1) (1867) L. R. 3 Ch. 93, 99.
(2) (1867) L. R. 4 Eq. 443, 446.
(3) (1877) 5 Ch. D. 183, 193.
(4) 16 M. & W. 418, 428.
(5) 2 Sim. 274; 29 R. R. 104.
(6) (1852) 2 D. M. & G. 145, 179.

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v. *Lethbridge* (1); *Beard* v. *Westcott* (2); *Reece* v. *Steel* (3); *Hugo* v. *Williams*. (4)]

BUCKLEY J. William Holmes died on March 7, 1835, leaving a will dated November 11, 1832, on which arise the questions which I have to decide. The first is whether, the will being before the Wills Act, his dispositions were so made as to pass the fee. Mr. Birrell, who appears for the person representing the heir-at-law of the testator William Holmes, does not see his way to argue the contrary. The will did pass the fee.

The second question arises upon certain language of the will. The testator left three children—Caroline, George, and Mary. George died in 1856 a bachelor and intestate; Caroline married a Mr. Richardson and died in 1874, leaving Augusta Ann Holmes Richardson her only child. That left Mary Holmes the surviving child of the testator. The question is whether the whole survived to Mary. That question arises upon these words in the will. After giving his property in such way as that the three children during their lives would enjoy it in thirds, the testator proceeds as follows: "Provided always and I do hereby declare that if any such of my said children shall depart this life unmarried"—which happened in the case of George, but did not happen in the case of Caroline—"or being married without leaving any child or children"—which did not happen in the case of Caroline—"then the part or share of him, her, or them so dying shall go and accrue to the survivor or survivors of my said children to be equally divided between them, if more than one share and share alike." On those words it is quite plain that on the death of George unmarried his share accrued to Caroline and Mary, who survived him, and there was a moiety so far in each of them. Then he goes on: "And that the last survivor of my said children shall stand and be possessed of all my said freeholds for his or her own absolute use and benefit, with full liberty and

(1) (1795) 6 T. R. 213; 3 R. R. 157.

(2) (1813) 5 B. & Al. 801; (1822) 5 Taunt. 393; 24 R. R. 553.

(3) (1828) 2 Sim. 233; 29 R. R. 88.

(4) (1872) L. R. 14 Eq. 224.

power to dispose thereof either by deed or will as his or her own absolute estate and effects." It is argued that because one child, namely, George, died unmarried, these words carry the whole of the property to Mary, although Caroline died leaving children. Even if the will had stopped at the point to which I have read, I should not have been of that opinion. I think that the words "if any such of my said children" are not answered by the death of one in the circumstances there mentioned, so that the subsequent words are then to have effect as regards the shares of all, but are to be applied in the case of each child who dies, and that when Caroline died leaving children an event happened which prevented a survivorship of the entirety to Mary as the last survivor. But it is not necessary to determine the question upon that clause of the will, because after the clause which I have read the testator continues: "But in case" (that is to say he is making an exception from what precedes, and in effect saying "Provided nevertheless that in case something else happens, then there shall be another result") "such son or daughter so dying shall leave issue"—which was the case with Caroline—"the share of such child so dying to go and be divided equally amongst his or her child or children, whether sons or daughters, for life, share and share alike if more than one." Having regard to that clause, I think it is plain that there was not a survivorship to Mary, but that on the death of Caroline the property so passed as that Mary and Caroline's child were entitled between them in moieties.

Mary thus became absolutely entitled to a moiety, and under a disposition which she made it passed to Augusta Ann Holmes Richardson, Caroline's child. There is no question about that moiety. The question is what happened in the case of Caroline's moiety. Now the will continues as follows: "and so to be continued and distributed in a descending line per stirpes from issue to issue for life so long as any issue shall be living descended from my said children, the children of the parent dying taking parent's share equally between them in all cases of decease." Now if those estates are what on the face of the will they purport to be, successive life estates, there is no

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question but that they are void after the life estate in favour of Augusta, who is now dead.

But it is argued that the result was that Augusta, or her mother, took an estate tail, and that Augusta, being entitled to an estate tail, barred the estate tail by a deed of July 14, 1892, and thus became entitled absolutely to the other moiety. Mr. Birrell, for the heir-at-law of the testator, says that is not so, that there was no estate tail, and that on the death of Augusta there was an intestacy, and that he is now entitled. In my opinion that contention must succeed. The question is whether I can so construe the limitations of this will, having regard to the decisions to which I will refer, as to arrive at the conclusion that effect is to be given to the paramount intention of the testator by holding that there is an estate tail, although in point of fact his language is that there shall be successive estates for life.

Before going to the cases, let me say under what circumstances, as it seems to me, this doctrine of cy-près is applicable. If you find successive limitations for life to persons who stand in such relation to each other as that they would take successively under an estate tail, if the limitations were construed as creating an estate tail, but who cannot take in the literal terms of the gift by reason of the limitations as they stand being void, then it may be possible under certain circumstances to apply the doctrine of cy-près, and to say that instead of the estate purported to be given by the will an estate tail has been created. Because in such case every person indicated will in his turn occupy and enjoy the property for his life in the sense that he cannot enjoy it after his death, although it is true he will enjoy it, not as tenant for life, but as tenant in tail. The result will be that, if the estate tail is not barred, the persons indicated will in succession each enjoy the property during his life. To put it in the language of Rolfe B. in *Monypenny* v. *Dering* (1): "By these means, the estate, if left, as it were, to itself, will go in the precise course marked out by the testator, though it will be (contrary to what he intended) liable to be divested from that course by the act of the first

(1) 16 M. & W. 418, 428.

taker." Each successive person will enjoy it so long as he is alive; but of course if the estate tail is barred the testator's intention will be defeated; otherwise, if you leave it alone, it will go the right way. In such case you may apply the doctrine of cy-près, and say that an estate tail will in substance give effect to the paramount intention.

But directly you find that the persons to benefit are a class larger than those who would take under an estate tail—that the estate tail if left alone will reach, not the intended beneficiaries, but them and others—then the matter is a totally different one. In the present case the point of the whole matter as it seems to me lies in this—that as you pass from generation to generation the children of the parent dying are to take their parent's share equally between them. As you come to each generation it is not the heir in tail who is to take, but the heir in tail and all his brothers and sisters are to take equally between them. That is a direction hopelessly inconsistent with an estate tail, and the creation by implication of an estate tail will not give effect to that intention at all.

Now passing from that to the authorities, I look to see under what circumstances the Court can in any case, merely from a succession of life estates, infer that an estate tail is given. The decision of Lord Ellenborough in *Seaward* v. *Willock* (1) seems to me to be a plain decision that from a mere succession of life estates you cannot infer an estate tail. It is true that in that case the successive life estates were given only down to the tenth generation, and not indefinitely, which, of course, is a cardinal and important fact. But Lord Ellenborough did not rely upon that. The ground upon which he puts his decision is this. He says (2): "His"—the testator's —"meaning clearly was to give estates for life only to his grandson, and after him to his sons, and after them to their sons down to the tenth generation; for he has added the words 'during his or their natural lives' to each limitation." I pause there to say that that is exactly the case in the present will—a life estate expressly mentioned in each case. "But," continues

(1) 5 East, 198. (2) 5 East, 205.

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Lord Ellenborough, "this he could not do by law, inasmuch as the law will not allow of a successive limitation of estates for life to persons unborn. Can we then make another will for the testator giving to his devisees different estates than those he meant to give to them, because the estates he intended cannot by the rules of law take effect? This I conceive would be assuming a power which does not belong to us, of turning a legal devise into an executory trust." Then a little lower down, after reading the devise as he says it should be read, he proceeds: "And so reading it, we find no words shewing a general intent to give an estate tail in contradiction (1) to the express estates for life, so precisely given to each description of persons who are to take under the will." It appears to me that the reasoning of Lord Ellenborough is exactly applicable to this case. This is not an executory trust; these are dispositions in favour of the children, and they are simply dispositions of successive life estates, and, as I point out, the successive life estates are to a larger class of persons than ever could take under an estate tail.

But there are cases in which a disposition simply giving successive life estates with something more may be and has been construed as creating an estate tail. I may refer to *Forsbrook* v. *Forsbrook*. (2) There the limitations were to the eldest son of C. and the eldest son of T. during their lives, "and so on the eldest son of the two families of the name of Forsbrook to inherit the aforesaid property for ever." The persons to take were, therefore, confined to the persons who could take under an estate tail; and the point of difficulty here, that all the brothers and sisters are to take, did not arise. Moreover, as I read Lord Cairns' judgment, he was not differing from *Seaward* v. *Willock* (3); and I think that he would not have decided the case in the way in which it was decided if the limitations had been equivalent to those in *Seaward* v. *Willock* (3), because he relies on this fact, that after giving to persons successively for life, the testator says: "And so on the eldest son of the two families of the name of Forsbrook to inherit the aforesaid property for ever"; upon which Lord

(1) *Sic.* (2) L. R. 3 Ch. 93. (3) 5 East, 198.

Cairns says (1): "These last words clearly indicate a series of inheritances, and constitute words of limitation." So there you have, not merely successive life estates, but words which the Court held to be words of limitation giving an estate of inheritance. There it was held that there was created an estate tail.

Another case which comes in at this point is *Parfitt* v. *Hember*. (2) There I find words which might have created the difficulty which arises in the case before me, namely, that the property is to go to the "nephews and niece, and the survivors of them, for their respective lives and the life of the longest liver of them, and to the issue and issues of them respectively for their respective lives for ever, as tenants in common." The testator in that case was contemplating a plurality of persons who were to take. They are words to some extent similar to the words "the children of the parent dying taking their parent's share equally between them"; but it was possible to give effect to those words without creating the difficulty, because what was being spoken of was a number of stocks. It was a gift to the nephews and niece and the survivors of them for their lives, and the issue and issues of them respectively for their respective lives, and, therefore, you could give effect to the plurality by the idea of plurality of stocks without necessarily inferring that it meant a plurality of persons in the stock. Moreover, in that case there was this further, that the testator spoke of the estate which he was creating as an entail. He speaks of "the before-stated entails to my nephews and niece and their respective issues as aforesaid." So that in that case there were the means of coming to the conclusion, and the Court did come to the conclusion, that the cy-près doctrine might be adopted so as to create an estate tail.

Now, excepting in cases of that class, there is, so far as I can see, but for the case of *Mortimer* v. *West* (3), to which I must refer, no ground for inferring an estate tail.

I find that in Jarman on Wills, 5th ed. p. 270, the author, after referring to this doctrine of cy-près, says: "It has been decided" that the doctrine "is inapplicable where an attempt

(1) L. R. 3 Ch. 97. (2) L. R. 4 Eq. 443.
(3) 2 Sim. 274; 29 R. R. 104.

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is simply made to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite series of generations."

In *Humberston* v. *Humberston* (1), the case which lies to some extent at the root of the doctrine, the point decided was that the trust being merely an executory trust, the Court would give effect to it by directing a settlement to be executed, so as to carry out that which the Court found to be the intention of the party. The order was that "the master should see a settlement made of the said trust estate pursuant to the said will, with limitations" in a particular way giving an estate tail.

That decision, however, has no application to a case where, as here, the trust is not executory, but the estates are created by the will itself.

With that I pass to the case of *Mortimer* v. *West* (2), which creates the great difficulty here. In *Mortimer* v. *West* (2) the language of the will was to a very great extent identical with that of the will before me. The gift was, after the decease of the children of Martha leaving issue, "the share of such child so dying to go and be divided equally between his or her children, whether sons or daughters, for life, share and share alike, ... and so to be continued and distributed, in a descending line, per stirpes, from issue to issue, for life, so long as any issue shall be living descending from the said Martha Davies, the children of the parent dying to take such parent's share, equally between them." I have here exactly the point to which I called attention just now: the class to take is larger than the class which could take under an estate tail. But there was in that case a gift over—"and for default of any such issue descending and proceeding from the said children of Martha Davies"—then over. *Mortimer* v. *West* (2), therefore, is not the case before me, because here there is not a gift over: there is a gift of residue, but that is not, of course, equivalent to a gift over. Then what is the decision? It is the decision and the principle of the decision which binds me. The Vice-Chancellor says (3): "In this will there is an evident and expressed intention that all the children

(1) 1 P. Wms. 332. (2) 2 Sim. 274; 29 R. R. 104.
(3) 2 Sim. 282.

who take in the first instance, and their children, should take estates for life. Now, in *Seaward* v. *Willock* (1) the Court was compelled to say that, as there was a single intent to create a succession of life estates, which was not warranted by law, Thomas Southcomb took an estate for life only in the property devised to him and his descendants." If I stop here, I understand the Vice-Chancellor to say: "There is a decision in *Seaward* v. *Willock* (1) which would dispose of this case in a way the contrary of that in which I am going to decide it, and I should have to follow that but for a circumstance which I am going to mention." Then he goes on: "But here, besides the intention to give life estates, there is an intention that the estates shall not go over until there is a general failure of issue. That circumstance, according to the judgment of Lord Ellenborough C.J. in *Seaward* v. *Willock* (1) and the decision in *Jesson* v. *Wright* (2), compels me to hold that the persons who are to take under this will, take estates tail in the freeholds and copyholds."

I need not stop to consider why the presence of this gift over should make all that difference. If I had a case which was on all fours with *Mortimer* v. *West* (3) I should follow *Mortimer* v. *West* (3); but it appears to me that that case does not govern the case before me, for the reason that the cardinal circumstance on which the Vice-Chancellor relied in deciding the case, namely, that there was a gift over, does not here occur. As I read his judgment, in the absence of the gift over he would have decided the case the other way, on the footing of *Seaward* v. *Willock*. (1) I ought so to decide this case, on the authority of the other cases which have been referred to. I am very sorry to come to this decision, because, as I understand, dispositions of the property have been made on the footing that the lady did take an estate tail and that she barred it. The matter has, however, now come before the Court for decision, and I can only decide it as seems right to me. My decision is based on this ground, that there are here simply successive limitations of life estates not followed, as in *Forsbrook* v. *Forsbrook* (4), by anything indicating estates of

(1) 5 East, 198.
(2) (1820) 2 Bli. 1; 21 R. R. 1.
(3) 2 Sim. 274; 29 R. R. 104.
(4) L. R. 3 Ch. 93.

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inheritance, and that, apart altogether from that point, the beneficiaries who are to take are not such as would take under an estate tail, but are a larger class, namely, all the children of every generation. I agree that that circumstance occurred in *Mortimer* v. *West*. (1) How it was got over there I do not pretend to understand; but inasmuch as there is not present here that which was relied on in *Mortimer* v. *West* (1)—the presence of a gift over—I think that case does not apply. Therefore I do not follow it.

I hold that on the death of Augusta there was an intestacy, and that the heir-at-law of William Holmes, the testator, is entitled.

I ought perhaps to add that in *Monypenny* v. *Dering* (2) Lord St. Leonards refers to *Mortimer* v. *West* (1) in terms which I will simply read without commenting upon them. He says: "The other case referred to was *Mortimer* v. *West* (1), before the Vice-Chancellor, in which, though there were void estates for life, his Honour relied upon a general gift over (whether properly or not I need not now consider); but it is no authority on which I can act for the general proposition, which I do not think can be maintained." The general proposition will be found stated in these words (3): "It has also been argued here very ingeniously, that wherever you find an estate tail given to the parent, either under an actual limitation which would admit of no difficulty, or by implication (as, for example, to A., and if he dies without issue to B., where an estate tail arises by implication from the gift over), if the preceding or following limitations in the will are to the children of that person, they may be rejected, and that it is utterly unimportant that successive estates are by these limitations attempted to be raised which would be void for perpetuity. I know" (says Lord St. Leonards) "of no such rule, and must deny that any such exists."

Solicitors for all parties: *Vandercom & Co.*

(1) 2 Sim. 274; 29 R. R. 104. (2) 2 D. M. & G. 145, 179.
(3) 2 D. M. & G. 177.

F. E.

GREAT TORRINGTON COMMONS CONSERVATORS *v.* MOORE STEVENS.

JOYCE J.
1903
Aug. 3, 4, 5; *Nov.* 10; *Dec.* 5.

[1902 G. 1431.]

River—Riparian Proprietor—Statutory vesting of Lands abutting on River—Presumption that the Bed of the River passes ad medium filum—Island in Middle of River—Extent of Presumption.

By a private Act of Parliament passed to settle certain disputes between the lord of a manor and the commoners certain common lands abutting on a river were vested in a body of conservators incorporated by the Act. Such lands were defined in a schedule to the Act and by reference to a map, but these were not so expressed or drawn as to include any part of the bed of the river. The conservators by virtue of the presumption applicable to a grant of land abutting on a river claimed to be entitled to the adjoining moiety of the bed of the river including the moiety of an island in the middle of the river, and they brought an action against another riparian proprietor in respect of an alleged trespass by the removal of gravel from this half of the bed of the river. This island was of ancient origin. The spot from which the gravel was dug was partly opposite to the island, and nearer to the island than to the plaintiffs' bank:—

Held, that, assuming that the presumption applied, the medium filum aquæ ought to be drawn, not through the island, but through the stream between the island and the plaintiffs' lands, and that the action failed.

Semble, the plaintiffs were entitled under the Act to half the bed of the stream between their lands and the island.

THIS was an action for an injunction and damages in respect of an alleged trespass by the removal of gravel from the bed of the river Torridge.

The plaintiffs were a body of conservators incorporated by the Great Torrington Commons Act, 1889 (52 & 53 Vict. c. clxvii.), and were seised in fee simple in possession of certain common lands in the borough of Great Torrington known as Great Torrington Common, upon the trusts and for the purposes declared in the Act. Part of this common was bounded on the west by the river Torridge, which was also the boundary of the borough. The defendant, John Curzon Moore Stevens, was the owner of certain lands known as the Drummetts

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Mill estate, on the opposite side of the river, in the parish of Frithelstock. This defendant being a very old man, the management of his affairs was undertaken by his son, the defendant, Richard Arthur Moore Stevens. In the middle of the river between the common and the defendants' land there was a small island of about a quarter of an acre in extent. It was proved that this island had been in existence for a very long time, and there was no evidence as to its origin. The plaintiffs as owners of the common claimed to be entitled to a moiety of the bed of the river where it bounded the common, and to a moiety of the island, by virtue of the presumption that a grant of land described as bounded by a river passes the adjoining half of the bed of the river. In June, 1902, the defendent R. A. Moore Stevens removed gravel from the bed of the river at a spot which was partly opposite to the south end of the island and between the island and the Torrington bank, but nearer to the island. The plaintiffs complained of this as a trespass on their land. The defendants denied that any part of the bed of the river belonged to the plaintiffs, and they alleged that the island and the spot from which the gravel was taken were the property of the defendant J. C. Moore Stevens; but this was not satisfactorily proved. The defendants relied upon the terms of the Great Torrington Commons Act, 1889, as excluding the presumption that a moiety of the bed of the river passed to the plaintiffs. That Act, which is cited as the Great Torrington Commons Act, 1889, was intituled "An Act for vesting Great Torrington Common, Castle Hill Common, and other lands in the borough of Great Torrington, in the county of Devon, in a body of conservators, and to settle questions between the commoners of Great Torrington and the owners of the Rolle estate, and for other purposes"; and, as appeared from the recitals, it was passed for the purpose of putting an end to certain disputes which had arisen between the owners of the Rolle estate, who claimed to be entitled to the manor of Great Torrington, and the inhabitant householders of the borough of Great Torrington, who claimed to be entitled to rights of common over the common and waste lands of the manor. This Act also recited

that a plan thereinafter called the "deposited plan," shewing the area and boundaries of the hereditaments intended to be dealt with by the Act, had been prepared for the purposes of the Act. By sect. 20 certain hereditaments specified in the 1st schedule to the Act, being pasture and arable lands belonging to the Rolle estate, were vested in the conservators upon the trusts thereinafter declared. Sect. 23, which dealt with the common lands of the manor, provided that the hereditaments specified in the first part of the 5th schedule to the Act should be vested in the conservators as from the passing of the Act for all the estate and interest of the persons entitled to the Rolle estate freed and discharged from all the manorial rights of the owners of the Rolle estate, but subject to the provisions of the Act concerning commons. Sect. 38 provided as follows: "Nothing in this Act or any by-law of the conservators shall take away abridge or prejudicially affect any right of common commonable or other like right or any right of way right of sporting or other right in over or affecting the commons other than the manorial rights of or claimed by the owners of the Rolle estate affecting the same and the inhabitants of the said borough of Great Torrington shall at all times have the same right of fishing as is now vested in or is exercisable by the owners of the Rolle estate in that half of the river Torridge or other waters which will adjoin the hereditaments specified in the First and Fifth Schedules to this Act." The lands comprised in the first part of the 5th schedule were therein described as "The common and waste lands known as Great Torrington Common and Castle Hill Common respectively, as distinguished in the deposited plan by the colour green," and the several lands forming Great Torrington Common were defined by reference to the numbers in the deposited plan, and opposite each number the acreage of the particular parcel of land was stated with great minuteness, being calculated to three places of decimals. These lands as so defined did not include any part of the bed of the river. The deposited plan, which was copied from the 25-inch Ordnance map, also purported to define the boundary of the borough of Great Torrington by a dotted line

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which ran along the river, but was drawn so as to exclude from the borough the lands now in dispute.

The defendant J. C. Moore Stevens died during the trial, and the action was continued against the other defendant alone.

This case was twice argued.

Hughes, K.C., and *C. Gurdon*, for the plaintiffs. The Act conveys the lands coloured green in the map to the conservators, and being entitled up to the bank of the river, primâ facie they are entitled to the bed of the river ad medium filum upon the presumption that a conveyance of land abutting on a road or a river carries with it the adjoining moiety of the soil of the road or bed of the river. The presumption proceeds on the principle that it is an advantage to the purchaser to get the half of the road or river adjoining the purchased property, and it is no advantage to the vendor to retain it: *Micklethwait* v. *Newlay Bridge Co.* (1); *Lord* v. *Commissioners for the City of Sydney*. (2)

Younger, K.C., and *T. A. Nash*, for the defendants. On the construction of the Act no part of the stream passed to the plaintiffs. The Legislature has provided a plan shewing the area and boundaries of the hereditaments intended to be dealt with by the Act, and this deposited plan must be rigidly adhered to. The lands vested in the plaintiffs are defined by reference to the numbers on the deposited plan, and the quantities are carried to three places of decimals. These circumstances point to a rebuttal of the presumption: *Pryor* v. *Petre*. (3) Further, the Act purports to deal only with lands in the borough of Great Torrington which were formerly part of the Rolle estate, and the dotted line on the deposited plan shews that no part of the land now in dispute is within the borough. Further, s. 38 speaks of the half of the river adjoining the lands vested in the conservators, and provides that the inhabitants of the borough shall have the same right of fishing in that half of the river as was formerly vested in

(1) (1886) 33 Ch. D. 133. (2) (1859) 12 Moo. P. C. 473, 497–8.
(3) [1894] 2 Ch. 11.

the owners of the Rolle estate. That shews that the presumption was not intended to apply to this case, and it negatives the view that there were any common rights of fishing in the river. Where common lands are bounded by a river it will not be presumed, in the absence of evidence, that the river is subject to commonable rights; at any rate, the fact that the right of fishing is in the lord of the manor is virtually conclusive against the existence of such rights: *Ecroyd* v. *Coulthard*. (1) Lastly, as regards the island, there is no evidence that it ever formed part of the Rolle estate, and it is an extraordinary proposition upon any presumption to maintain that this island is included in the property vested in the plaintiffs.

Hughes, K.C., in reply. The presumption applies, and is not rebutted. *Reg.* v. *Strand Board of Works* (2) shews that the same principles of construction apply, whether the land is conveyed by a deed or by an Act of Parliament. That disposes of any argument based either on the description of the land in the map and in the schedule, or on the language of s. 38, because the presumption postulates that the half of the river, or of the road, is not specified in the conveyance. Then it is said that the land must be in the borough of Great Torrington, and that the dotted line on the map shews that this land is not within the borough; but, first, there is nothing in the Act except the title to shew that the Act is confined to lands within the borough, and the title cannot be relied on as limiting the purview of the Act; and, secondly, the dotted line in the map was intended to shew merely that the river was the boundary, not what part of the river was the boundary. Even if the Act contained a recital that the municipal boundary was shewn by the dotted line, that would not have been conclusive: *Reg.* v. *Inhabitants of Haughton*. (3) In the Report of the Municipal Boundary Commissioners (Part III.), on which I rely, the dotted line in the map shewing the boundaries of Torrington is drawn approximately along the centre of the river, but goes to the Frithelstock side of the island. *Ecroyd* v. *Coulthard* (1) is distinguishable, because in that case the

(1) [1897] 2 Ch. 554; [1898] 2 Ch. 358. (2) (1863) 4 B. & S. 526, 547.
(3) (1853) 1 E. & B. 501.

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lord had a separate right of fishery, and the bed of the river was his separate property, whereas in this case there is no proof of any exclusive right in the lord. Where the common adjoined the river, the inhabitants had at the date of the Act the right of fishing over the adjacent moiety, but where the common did not adjoin the river the inhabitants had no such right of fishing apart from the Act, and the effect of s. 38 is to extend that right to all the inhabitants. That section is only consistent with the view that all the fishing rights have passed out of the hands of the Rolle family. With regard to the island the rule appears to be to draw the medium filum through any island which is in the middle of the river: Fleta, bk. 3, c. 2, s. 6; Woolrych on Waters, 2nd ed. p. 48; Angell on the Law of Watercourses, 6th ed. pp. 46–48; Bracton, bk. 2, c. 2, s. 2; Coulson's Law of Waters, 2nd ed. p. 102; Phear on Rights of Water, p. 11; Schultes on Aquatic Rights, pp. 118–119. There is no English decision on the point, but the question has been discussed in the American case of *Trustees of Hopkins Academy* v. *Dickinson*. (1)

[JOYCE J. Is not this doctrine confined to the case of a new island?]

Generally speaking, no doubt the question would arise only in the case of a new island, because otherwise there is usually some assertion of ownership; but unless the island is specifically appropriated, it is submitted that the rule extends to the case of an island the origin of which cannot be traced.

Cur. adv. vult.

Dec. 5. JOYCE J. This is an action by the Great Torrington Commons Conservators in respect of alleged trespass by the removal of gravel from the bed of the river Torridge, which runs by the borough of Torrington. The only real question in the case, I think, is whether the plaintiffs are in possession or are entitled to the possession of the locus in quo, by which I mean the spot from which the gravel was removed, which is part of the bed of the river Torridge. The

(1) (1852) 63 Mass. 544.

plaintiffs are a body created and incorporated by statute, namely, by the Great Torrington Commons Act, 1889. By that Act certain lands or interests (I am not sure that it was the whole estate—it is immaterial) described by reference to a map and schedules are vested in the plaintiffs; and certain of these lands adjoin the river Torridge, but the premises thus vested are not expressed or described so as to include any part of the bed of the river.

The contention of the plaintiffs is that, on the true construction of the vesting clause in the Act, the lands thereby vested in the plaintiffs comprise one moiety of the bed of the river where it bounds the lands defined and delineated on the map. No doubt there is a rule that, where a stream flows between two manors or properties, in the absence of any evidence to the contrary the boundary is taken to be the medium filum of the stream. In the present case, near the locus in quo, there is an island as old as or older than the banks on either side, and the river is in fact divided into two streams. Is the rule I have mentioned applicable to the whole of the river, so that the medium filum aquæ is to be drawn through the island, or is it to be drawn through the stream between the island and the land expressed by the Act to be vested in the plaintiffs? No title is shewn by the plaintiffs, in my opinion, to the island, unless it can be got by the application of the rule I have referred to, although it is well arguable that in the circumstances the plaintiffs are under the statute entitled to half the bed of the stream between their lands and the island; but I do not see my way to hold that they are entitled to anything beyond the medium filum of that stream, such medium filum being, I think, pretty accuretely described by the dotted line on the 25-inch Ordnance map.

Now it was proved, and practically admitted, that the locus in quo from whence the gravel was taken was not within this line—that is, not on the Torrington side of this line. This spot and the island in question are claimed by the defendants. I do not say that they have proved their title. I think they have not; but, on the other hand, the plaintiffs have not proved any title, nor indeed do I think that they could under

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any circumstances prove that they were entitled to the spot in question. The onus is on the plaintiffs to prove their case. In my opinion they have failed to do so, and, consequently, the action must be dismissed.

Solicitors: *Horne & Birkett, for J. R. Beavan, Great Torrington; Wood, Bigg & Nash, for H. M. James, Exeter.*

H. B. H.

SWINFEN EADY J. 1903 Dec. 11.

TADDY & CO. *v.* STERIOUS & CO.

[1902 T. 1945.]

Contract—Validity—Sale to Wholesale Trader on Conditions as to Price on Resale—"Wholesale Trader to be deemed Agent of Manufacturer"—Purchase by Retail Trader from Wholesale Trader with Notice—Condition attached to Goods.

T. & Co., manufacturers of tobacco, sold packet tobaccos subject to printed terms and conditions fixing a minimum price below which they were not to be sold, and containing the following proviso: "Acceptance of the goods will be deemed a contract between the purchaser and T. & Co. that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of T. & Co." T. & Co. sold to N., who resold for his own profit to S. & Co. S. & Co. had notice of the conditions, but sold to the public at a price below the stipulated minimum:—

Held, that there was no contract between T. & Co. and S. & Co. which T. & Co. could enforce, and that conditions cannot be attached to goods so as to bind all purchasers with notice.

THE plaintiffs in this action were manufacturers of tobacco, who did a large trade in mixtures of tobacco sold in packets under various fancy names, one of which was "Myrtle Grove." In 1901 they desired to prevent retail dealers from selling their packet tobaccos under a fixed minimum price. For this purpose they printed upon all their invoices, price-lists, and catalogues relating to such goods the following terms and conditions:—

"MINIMUM RETAIL PRICES.

	1 oz.	2 oz.	4 oz.	8 oz. tins.	1 lb. tins.
"Myrtle Grove .	5*d.*	10*d.*	1*s.* 8*d.*	3*s.* 3*d.*	6*s.* 5*d.*

* * * * * *

"All the above packet tobaccos and cigarettes are sold by Taddy & Co. upon the express condition that retail dealers do not sell the packet tobaccos or cigarettes below the prices above set forth.

"Acceptance of the goods will be deemed a contract between the purchaser and Taddy & Co. that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of Taddy & Co."

There was also a reference to these conditions at the foot of every invoice, and a label or notice containing the terms and conditions had, since the plaintiffs adopted them, been firmly attached inside every box of packet tobaccos or cigarettes sold by the plaintiffs.

The plaintiffs sold Myrtle Grove tobacco under these terms and conditions to the defendant Netten, a wholesale dealer. He, for his own profit, sold it to the defendants Sterious & Co., a firm of retail tobacconists. Sterious & Co. sold the Myrtle Grove tobacco to the public at $4\frac{1}{2}d.$ an ounce, and refused to desist from doing so when requested by the plaintiffs.

The plaintiffs brought this action for a declaration that the defendants were not entitled to sell any packet tobacco or cigarettes manufactured by the plaintiffs except at such prices and upon such terms and conditions of supply as were specified and contained in the invoice catalogues, price-lists, labels, and notices above referred to.

It was alleged that the defendant Netten had wrongfully agreed with the defendants Sterious & Co. that they might sell the tobacco in breach of the said terms and conditions; but this was denied, and at the hearing no evidence was given against Netten, and the case was by consent dismissed with costs as against him.

The defendants Sterious & Co. admitted that they had sold the Myrtle Grove tobacco at $4\frac{1}{2}d.$ per ounce, and that they had full knowledge of the terms and conditions attempted to be imposed by the plaintiffs; but they claimed the right to sell at any price they chose notwithstanding the conditions.

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Hon. E. C. Macnaghten, K.C., and *H. B. Howard*, for the plaintiffs. The plaintiffs fix a minimum price for Myrtle Grove tobacco, and attach a statement of the conditions to every box they sell; one of the conditions is that a wholesale dealer who sells to a retail dealer is to be deemed an agent. The retailer who buys under these conditions enters into a contract with the wholesale dealer as the plaintiffs' agent which the plaintiffs are entitled to enforce. Perhaps the plaintiffs could not sue the retailer at common law: *Tweddle* v. *Atkinson* (1); but they rely on *Alcoy and Gandia Railway and Harbour Co.* v. *Greenhill* (2), where Stirling J. held that certain contractors could sue in equity on a guarantee given to a railway as to the solvency of certain bankers though the contractors were not parties to the contract.

De Mattos v. *Gibson* (3) lays down the rule that where a man buys property, movable or immovable, with knowledge of a previous contract as to special user, he may be restrained from any user contrary to the contract. In *Incandescent Gas Light Co.* v. *Cantelo* (4) the defendant had purchased without notice of the restrictive conditions. But Wills J. says: "Of course, if he knows of restrictions, and they are brought to his mind at the time of the sale, he is bound by them." The plaintiffs have a registered trade-mark for Myrtle Grove tobacco. It is their property, and they can attach what conditions they please to its sale.

The conditions are part of a contract made by the defendants with our agent, the wholesale dealer.

The delivery of a form makes a binding contract if the person to whom it is delivered accepts it without protest, even though he does not read it: *Watkins* v. *Rymill*. (5) Agreements to fix minimum prices are not in restraint of trade: *Elliman, Sons & Co.* v. *Carrington & Son, Ld.* (6) The wholesale dealer could only sell to a retail dealer as our agent. The retail dealer knew this, and he is bound to admit the agency.

(1) (1861) 1 B. & S. 393.
(2) (1897) 76 L. T. 542.
(3) (1859) 4 De G. & J. 276, 282.
(4) (1895) 12 Rep. Pat. Cas. 262, 264.
(5) (1883) 10 Q. B. D. 178.
(6) [1901] 2 Ch. 275.

Micklem, K.C., and *Mossop*, for Sterious & Co. The defendants, Sterious & Co., have openly sold Myrtle Grove tobacco at 4½*d.* an ounce, and they claim the right to do so. The plaintiffs' case is put as depending on a contract between these defendants and the plaintiffs; but there is no such contract. If the conditions are looked at, they only apply to purchasers from Taddy & Co., either direct or through a wholesale dealer. The provision that the wholesale dealer is to be deemed an agent is meaningless. He either is an agent or he is not. In this case it is proved and admitted that Netten was not an agent for Taddy & Co. He had bought the tobacco out and out, and sold it on his own account. There is no contract. The conditions are a mere attempt to attach a condition to the goods throughout the market and into whosesoever hands they may come. That is contrary to law: Pollock on Contracts, 7th ed. p. 235.

De Mattos v. *Gibson* (1) was the case of a person buying a ship subject to a charterparty; it is nothing like the present case, and when carefully examined is in our favour.

If the plaintiffs' construction of the conditions is correct, they would be in restraint of trade. *Elliman, Sons & Co.* v. *Carrington & Son, Ld.* (2), is inconsistent with the earlier cases: *Hilton* v. *Eckersley* (3); *Urmston* v. *Whitelegg Brothers* (4); *Mitchel* v. *Reynolds.* (5)

Vernon Smith, K.C., and *R. J. Parker*, appeared for the defendant Netten.

Hon. E. C. Macnaghten, K.C., in reply.

SWINFEN EADY J. In this case the plaintiffs are manufacturers of tobacco. There are two defendants—Sterious & Co., who are retail tobacconists at Southend, and James Netten, a wholesale dealer. The plaintiffs submit to have their action dismissed with costs as against Netten; there only remains, therefore, their action against Sterious & Co. The object of the action is to obtain a declaration that these defendants are

(1) 4 De G. & J. 276.
(2) [1901] 2 Ch. 275.
(3) (1855) 6 E. & B. 47.
(4) (1890) 63 L. T. 455.
(5) (1711) 1 P. Wms. 181.

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not entitled to sell any packet tobaccos manufactured by the plaintiffs except at such prices and generally upon terms and conditions of supply as were specified and contained in their invoices, price-lists, and catalogues, and also in labels and notices attached to the boxes in which the tobacco was sold, and an injunction. [His Lordship stated the facts as to the notices, and continued:—]

The defendants have dealt in the plaintiffs' tobaccos for some time. It is not suggested that they were ignorant of the terms and conditions issued by the plaintiffs. Complaints were made on several occasions of the defendants selling under the minimum price, and since the writ was issued the defendant Netten has agreed not to sell them any more of this tobacco, and the supply from that source has ceased. But the claim made by Taddy & Co. is not confined to tobacco obtained by Sterious & Co. from Netten, but is quite general. The plaintiffs put their case in two ways. First, they contended that the conditions constituted a contract made by Sterious & Co. with Netten as the plaintiffs' agents, and that they are entitled to restrain Sterious & Co. from acting in breach of that contract. Secondly, they contended that the goods were sold subject to certain conditions, and that even if Netten or any one else had purported to sell them free from the conditions, Sterious & Co., having notice of the conditions, could not sell the goods except according to the conditions, and the plaintiffs were entitled to restrain them from doing so.

With regard to this last contention, there is a short answer. Conditions of this kind do not run with goods, and cannot be imposed upon them. Subsequent purchasers, therefore, do not take subject to any conditions which the Court can enforce. If there was a breach of contract, the plaintiffs could no doubt sue. The question remains, therefore, whether there was any contract. There was no direct contract between Sterious & Co. and Taddy & Co., and the question does not arise as to the effect of a sale by Taddy & Co. direct to a retail trader subject to these terms as to minimum retail price. The part of the conditions now in question is: "In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be

deemed to be the agent of Taddy & Co." Now it is quite clear that Taddy & Co. sell to wholesale dealers out and out. The wholesale dealers are not Taddy & Co.'s agents to sell the goods; they buy them out and out, and sell them for their own profit. It was argued that the words in the special condition, "purchase by a retail dealer through a wholesale dealer," can only refer to cases where the wholesale dealers really are the agents of Taddy & Co., and do not apply to cases where the wholesale dealers first bought and then resold. That seems to be the right construction. If, however, the condition ought to be construed as applying to a purchase from as well as through a wholesale dealer—even then, a wholesale dealer selling for his own profit would not be an agent of Taddy & Co. in the ordinary sense of that term. Nor can it be said that the wholesale dealer was selling the goods for his own profit, and at the same time entered into a collateral contract with the purchaser, as to the subsequent dealing with the goods, as the agent of Taddy & Co. No such collateral contract was in fact entered into. In my opinion, when the wholesale dealer sold the goods for his own profit, he was not in any sense whatever the agent of Taddy & Co., and the mere insertion in the condition of the words that he was to be deemed to be an agent could not make him one. Whatever may be the case as between Taddy & Co. and Netten, there is no contract between Taddy & Co. and Sterious & Co.

Solicitors: *Rivington & Son; Westbury Preston & Stavridi; Ellis, Bickersteth & Ellis.*

J. R. B.

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1904

Jan. 19.

In re EUPHRATES AND TIGRIS STEAM NAVIGATION COMPANY, LIMITED.

[1903 E. 0132.]

Company—Memorandum—Alteration—Jurisdiction—Company under Joint Stock Companies Acts, 1856, 1857 (19 & 20 *Vict. c.* 47; 20 & 21 *Vict. c.* 14)—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 175, 176—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-s.* 1; *s.* 3, *sub-s.* 2.

The Companies (Memorandum of Association) Act, 1890, applies to a company formed and registered under the Joint Stock Companies Acts, 1856, 1857, so that the Court has jurisdiction to confirm an alteration of its memorandum.

In re Nitrophosphate and Odams Chemical Manure Co., Ld., [1893] W. N. 141, *In re Hong Kong and China Gas Co., Ld.*, [1898] W. N. 158, and *In re Copiapo Mining Co.*, [1899] W. N. 25, followed.

In re General Credit Co., [1891] W. N. 153, not followed.

PETITION.

This was a petition by a company formed and registered under the Joint Stock Companies Acts, 1856, 1857, as a company limited by shares, asking the Court to confirm an alteration of its memorandum of association under the Companies (Memorandum of Association) Act, 1890.

The only question was whether the Act applied to such a company.

Eve, K.C., and *R. J. Parker*, for the company. Sect. 1, sub-s. 1, of the Companies (Memorandum of Association) Act, 1890, provides that "a company registered under the Companies Acts, 1862 to 1886," may alter its memorandum; and s. 3, sub-s. 2, provides that "this Act and the Companies Acts, 1862 to 1886, shall be construed as one Act."

Again, s. 176 of the Companies Act, 1862, provides that this Act, with the exception of Table A, "shall apply to companies formed and registered under the said Joint Stock Companies Acts,"—which by s. 175 include the Joint Stock Companies

Acts, 1856, 1857—"or any of them, in the same manner in the case of a limited company as if such company had been formed and registered under this Act as a company limited by shares, and in the case of a company other than a limited company as if such company had been formed and registered as an unlimited company under this Act."

These companies sometimes register under s. 180 of the Companies Act, 1862, in order to acquire new powers: Buckley on Companies, 8th ed. p. 477; but in the present case this has not been done.

The other sections, however, read together, shew that the Companies (Memorandum of Association) Act, 1890, applies to a company registered under the Joint Stock Companies Acts, 1856, 1857.

In *In re General Credit Co.* (1) Romer J. held that he had no jurisdiction in such a case; but his attention was not called to s. 176 of the Companies Act, 1862.

In *In re Nitrophosphate and Odams Chemical Manure Co., Ld.* (2), Kekewich J. held that he had jurisdiction; but his attention was not called to the previous decision of Romer J.

In *In re Hong Kong and China Gas Co., Ld.* (3), Kekewich J. considered the decision of Romer J., but adhered to his own view.

In *In re Copiapo Mining Co.* (4) Wright J. followed the decisions of Kekewich J. in preference to that of Romer J.

The balance of authority is therefore in favour of the jurisdiction.

[SWINFEN EADY J. Sect. 176 of the Companies Act, 1862, only says that the Act shall apply to a company registered under the Joint Stock Companies Acts. Such a company does not ipso facto become a company registered under the Act of 1862, and it is difficult to see how the Companies (Memorandum of Association) Act, 1890, applies.]

The Companies (Memorandum of Association) Act, 1890, now forms part of the Companies Act, 1862.

(1) [1891] W. N. 153.
(2) [1893] W. N. 141.
(3) [1898] W. N. 158.
(4) [1899] W. N. 25; 6 Manson, 320.

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EUPHRATES AND TIGRIS STEAM NAVIGATION COMPANY, LIMITED, *In re.*

[SWINFEN EADY J. What is your objection to registering under the Companies Act, 1862?]

It would cause expense and delay, as the officials would investigate the whole history of the company.

SWINFEN EADY J. I think I have jurisdiction in this case. The Companies (Memorandum of Association) Act, 1890, s. 3, sub-s. 2, provides that "this Act and the Companies Acts, 1862 to 1886, shall be construed as one Act"; and s. 176 of the Companies Act, 1862, read by the light of this section provides in effect that the Companies Act, 1862, and the Companies (Memorandum of Association) Act, 1890, which is now part of it, shall apply to companies formed and registered under the Joint Stock Companies Acts, 1856, 1857. Kekewich J. and Wright J. have already adopted this construction, and I think I am justified in following their decisions.

Solicitors: *Hollams, Sons, Coward & Hawksley.*

G. R. A.

SWINFEN EADY J.
1904
Jan. 20, 26.

In re KING.
TRAVERS *v.* KELLY.

[1903 K. 989.]

Will—Testamentary Expenses—Direction to pay—Settlement Estate Duty—Finance Act, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-s.* 1.

Settlement estate duty on personalty is not a testamentary expense, although the executor is accountable for it.

It is therefore payable out of the settled property under the Finance Act, 1896, s. 19, sub-s. 1, notwithstanding a direction in the will to pay testamentary expenses out of residue.

ORIGINATING SUMMONS.

By his will dated November 11, 1895, the testator, after appointing the plaintiffs executors and trustees and giving certain specific and pecuniary legacies, gave to each of his sons John and Henry a legacy of 12,000*l.* "free of all duties," and to his daughter Annie and his sons Arthur and Alfred a legacy of 20,000*l.* each. The testator then settled the 12,000*l.* legacies upon certain trusts for the benefit of the legatees and their families respectively, and directed the trustees to retain and hold the daughter's 20,000*l.* legacy upon the trusts declared as to her share of residue. The testator then devised and bequeathed his residuary real and personal estate to the trustees upon trust to sell and convert the same into money, and out of the proceeds thereof to pay his funeral and "testamentary expenses," debts, legacies, and the legacy duty thereon, and to stand possessed of the residue in trust for his three younger children, Annie, Arthur, and Alfred, in equal shares, the daughter's share being settled on the usual trusts for herself and her issue.

The testator died on March 26, 1899.

The daughter, who married L. O. Kelly on July 28, 1900, had one child.

This summons was issued to determine whether the settlement estate duty on the daughter's 20,000*l.* legacy and share

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of residue ought to be paid out of that legacy and share, or out of general residue.

Stuart Bevan, for the executors and trustees.

George Lawrence, for the daughter and her child. There is an express direction to pay testamentary expenses out of residue, and as testamentary expenses include estate duty on personalty—*In re Clemow* (1)—and estate duty includes settlement estate duty—*In re Leveridge* (2)—testamentary expenses include settlement estate duty on personalty.

The case may, however, be put on broader lines.

Sect. 5, sub-s. 1, of the Finance Act, 1894 (57 & 58 Vict. c. 30), imposed "a further estate duty (called settlement estate duty)" on property settled by the will. Sect. 17 fixed the rate at 1 per cent., and s. 21, sub-s. 4, provided that it should not be payable in respect of property settled by a disposition taking effect before the commencement of the Act.

It was not mentioned elsewhere in the Act, so that it could only be collected and recovered under s. 6 as a further estate duty, which in the case of personalty was payable by the executor on delivering the Inland Revenue affidavit: *In re Webber* (3), approved on this point in *In re Maryon-Wilson* (4), though disapproved on the question of incidence. It is now thrown on the settled property "unless the will contains an express provision to the contrary," and is collected upon an account delivered by the executor within six months after the death, or within such further time as the Commissioners may allow: Finance Act, 1896, s. 19.

The executor is therefore still accountable for the duty, though it is thrown on the settled property and paid on a separate account: *In re Maryon-Wilson*. (4)

In *Sharp* v. *Lush* (5) Jessel M.R. said that "executorship expenses," or their equivalent, "testamentary expenses," were "expenses incident to the proper performance of the duty of the executor."

(1) [1900] 2 Ch. 182.
(2) [1901] 2 Ch. 830.
(3) [1896] 1 Ch. 914.
(4) [1900] 1 Ch. 565.
(5) (1879) 10 Ch. D. 468, 470.

Any liability, therefore, for which an executor is accountable, or which he is bound to pay, is a testamentary expense whatever its incidence, e.g., the costs of upholding the will in a probate action: *In re Prince* (1); secus, estate duty on an appointed fund: *In re Dixon.* (2)

[SWINFEN EADY J. The executor is accountable for legacy duty, but it has never been treated as a testamentary expense.]

There is no decision on the point; but it would be a testamentary expense within *Sharp* v. *Lush.* (3)

In *In re Clemow* (4) and *In re Treasure* (5) Kekewich J. followed *Sharp* v. *Lush* (3), and held that estate duty on personalty was a testamentary expense, on the ground that the executor had to pay it to obtain probate; and in *In re Sharman* (6) he held that estate duty on realty was not a testamentary expense, as prepayment was not necessary. But though basing his decisions on a narrower ground, he clearly did not intend to restrict the generality of the definition in *Sharp* v. *Lush* (3), which, if strictly applied, shews that estate duty and settlement estate duty on personalty are testamentary expenses, because the executor is accountable for them; and estate duty and settlement estate duty on realty are not testamentary expenses, because the executor is not accountable for them, the time of payment being absolutely immaterial.

Rolt, for the other residuary legatees. The insertion of the words "free of all duties" in the case of the 12,000*l.* legacies, followed by their omission in the case of the 20,000*l.* legacies, is an indication that the latter legacies were to bear all duties.

There was no question of settlement estate duty in *In re Clemow* (4), which really only decided that testamentary expenses include general estate duty on personalty. *In re Leveridge* (7) decided that estate duty includes settlement estate duty. The decisions cannot, therefore, be combined as suggested. There is a great difference between the two duties. Estate duty on personalty, like probate duty, is necessarily paid by the executor as such before probate. Settlement

(1) [1898] 2 Ch. 225, 229.
(2) [1902] 1 Ch. 248.
(3) 10 Ch. D. 468.
(4) [1900] 2 Ch. 182.
(5) [1900] 2 Ch. 648.
(6) [1901] 2 Ch. 280.
(7) [1901] 2 Ch. 830.

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estate duty on personalty, like legacy duty, is paid after probate, the executor, having assented to the legacy, paying the duty as trustee for the legatee. The duty is imposed on the settled property, and the payment by the executor is merely part of the machinery of collection: *In re Maryon-Wilson.* (1) It is, therefore, not a testamentary expense: *In re Clemow.* (2)

A direction that "my debts and funeral and testamentary expenses, including all duties payable by law out of my estate," shall be paid out of an assigned fund does not cover settlement estate duty: *In re Lewis* (3); and a direction to pay funeral and testamentary expenses, debts, legacies, and annuities out of residue with a charge of any deficiency on the real estate does not cover that duty: *In re Duke of St. Albans.* (4) There is, therefore, nothing in the will to take the case out of s. 19 of the Finance Act, 1896, and the duty falls on the settled property.

George Lawrence, in reply. *In re Lewis* (3), which was decided before *In re Clemow* (2), turned on the words "duties payable by law out of my estate." The meaning of the expression "testamentary expenses" was not considered. *In re Clemow* (2), which was the first case in which that expression was considered in connection with estate duty, was not cited in *In re Duke of St. Albans* (4), and the present point was not raised or argued.

As the executor is accountable for the settlement estate duty on personalty it is a testamentary expense, and questions of incidence, time of payment, and the capacity in which he pays it are immaterial.

Cur. adv. vult.

Jan. 26. SWINFEN EADY J., after reading the will and pointing out that the words "free of all duties" used in the case of the 12,000*l.* legacies were not repeated in the case of the 20,000*l.* legacies, continued:—The daughter contends that the settlement estate duty on the 20,000*l.* legacy and share of residue settled on her and her issue ought to be

(1) [1900] 1 Ch. 565.
(2) [1900] 2 Ch. 182.
(3) [1900] 2 Ch. 176.
(4) [1900] 2 Ch. 873.

paid out of residue. The owners of the other two-third shares of residue contend that the duty must be borne by the settled property. Having regard to the provisions of s. 19, sub-s. 1, of the Finance Act, 1896, the settlement estate duty must be paid out of the legacy and share of residue unless the will contains an express provision to the contrary. The gift "free of all duties" does not apply to the 20,000*l.* legacy. Reliance was, however, placed upon the direction contained in the will to pay "testamentary expenses" out of residue, and it was urged that *In re Leveridge* (1) decided that settlement estate duty was estate duty, and that *In re Clemow* (2) decided that estate duty on personalty was included in a direction to pay testamentary expenses, and therefore settlement estate duty on personalty was a testamentary expense, and ought in the present case to be paid out of residue. It was, however, pointed out by Kekewich J. in *In re Clemow* (2) that estate duty on personalty takes the place of probate duty; and in *In re Treasure* (3) the same learned judge stated that the previous decision was based entirely on the reasoning that as payment of that duty was essential to obtaining a grant of probate, it must be considered as much a testamentary expense as any other payment necessarily or properly incurred by the executors for that purpose. It is clear that probate duty was a testamentary expense: *Davies* v. *Fowler*. (4) On the other hand it has been held that estate duty on realty is not a testamentary expense, as executors are not bound to pay it in order to obtain probate: *In re Sharman*. (5) Settlement estate duty is not payable in order to obtain probate, s. 19, sub-s. 2, of the Finance Act, 1896, allowing in every case six months after the death within which it may be paid, and in my opinion it has no analogy to probate duty. Then how can the settlement estate duty be considered a "testamentary expense"? In *Sharp* v. *Lush* (6) Jessel M.R. said that he could not distinguish between "executorship expenses" and "testamentary expenses," and that executorship expenses were

(1) [1901] 2 Ch. 830.
(2) [1900] 2 Ch. 182.
(3) [1900] 2 Ch. 648, 653.
(4) (1873) L. R. 16 Eq. 308.
(5) [1901] 2 Ch. 280.
(6) 10 Ch. D. 468.

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expenses incident to the proper performance of the duty of executor, in the same way as testamentary expenses were, neither more nor less. After burying the deceased, the first duty of the executor is to prove the will, and formerly the probate duty was, and now the estate duty on personalty is, a payment which must be made before probate can be obtained, as it must be paid on delivering the Inland Revenue affidavit, or affidavit for probate. The settlement estate duty is not then payable. The executor is made accountable for the settlement estate duty on personalty, and he must accordingly see that the duty is paid before parting with the legacy or share of residue, or assenting to the bequest; but in like manner the executor is also accountable for and liable to pay legacy duty on retaining or paying legacies, and certainly it cannot be contended that a direction in a will to pay "testamentary expenses" would extend to legacy duty on legacies not otherwise expressed to be given free of legacy duty. In *In re Lewis* (1) it was held that a direction in a will to pay "testamentary expenses, including all duties payable by law out of my estate," did not include settlement estate duty. Again, in *In re Duke of St. Albans* (2), where the will contained a direction to pay funeral and testamentary expenses, debts, legacies, and annuities out of residue, and charged the real estate with any deficiency, it was held by Stirling J. that the settlement estate duty on certain contingent legacies, which were to be treated as settled, must be born by the legatees, in accordance with the decision of the Court of Appeal in *In re Maryon-Wilson*. (3) In my judgment a direction to pay "testamentary expenses" does not extend to settlement estate duty, and therefore the will in question does not contain any express provision within the meaning of s. 19, sub-s. 1, of the Finance Act, 1896. The duty must be borne by the settled property.

Solicitors: *Sole, Turner & Knight; Arthur H. King.*

(1) [1900] 2 Ch. 176. (2) [1900] 2 Ch. 873.
(3) [1900] 1 Ch. 565.

G. R. A.

BRIGHT'S TRUSTEE *v.* SELLAR.

SWINFEN EADY J.

1904

Jan. 21
Feb. 2.

[1903 B. 1623.]

Costs—Taxation—Costs before Action—Threat of Proceedings—Preparation for Defence before Issue of Writ—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 29.

Defendant, being threatened with an action for being party or privy to a fraud disclosed in a previous action to which he was not a party, obtained a transcript of the speeches, evidence, and judgment therein before the issue of the writ in the present action, with a view to defending the same. The present action was subsequently dismissed for want of prosecution :—

Held, that the defendant was entitled under Order LXV., r. 27, sub-r. 29, to the costs of only so much of the transcript of the evidence and judgment as related to the issue in the present action.

SUMMONS to review taxation.

On March 3, 1903, the plaintiff's solicitors wrote to the defendant stating that their client, having read the judgment of Swinfen Eady J. of February 28, 1903, in *Bright's Trustee* v. *South American Electric Co., Ld.* [1902 B. 2558], had consulted them "with reference to your conduct in fraudulently assisting the bankrupt to transfer and conceal the whole of his assets for the purpose of defeating his creditors," threatening proceedings accordingly, and asking for the address of the defendant's solicitor who would accept service.

In the previous action the plaintiff had established that transfers of 21,800 out of 22,000 shares in Bright's Light and Power, Limited, were fraudulent and void under the statute 13 Eliz. c. 5, being made with intent to delay, hinder, or defraud the creditors of the bankrupt Bright. The present defendant, though a witness, was not a party to that action; but 4000 of the 21,800 shares fraudulently transferred had at one time stood in his name.

On March 20, 1903, in consequence of the above letter and with a view to defending the present action, the defendant's solicitor bespoke a transcript of the proceedings in the previous action, and obtained it on March 26. It consisted of four volumes containing 1830 folios, and cost 61*l.*

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The writ in the present action was issued on April 16, 1903, and the statement of claim delivered on May 15.

The plaintiff sought to recover damages against the defendant for the loss sustained by the bankrupt's estate by reason of the fraudulent dealings with the shares, and alleged that the defendant was party or privy to Bright's fraud.

In his defence, delivered on June 15, the defendant did not admit that any fraud had been committed, and denied that he was party or privy thereto. He said that he transferred the 4000 shares at Bright's request, without any intention to defeat Bright's creditors, and without knowledge of any such intention on Bright's part.

The action was not further proceeded with, and on November 9, 1903, it was dismissed with costs for want of prosecution.

The defendant's solicitor then carried in his costs, including 61*l.* for the transcript, 30*l.* 10*s.* for perusing it and making notes for counsel's assistance, and a fee of 5*l.* 10*s.* to counsel for perusing it on settling defence.

The master allowed the full cost of the transcript, 14*l.* 15*s.* for the solicitor's perusal, and the full fee for counsel's perusal.

The plaintiff having carried in objections, which the master disallowed, the plaintiff took out this summons to review.

Eve, K.C., and *Van Neck*, for the plaintiff. The transcript was obtained three weeks before the writ was issued, so that the charge cannot be allowed as costs of action. But even if obtained in May, as wrongly stated in the bill, it was premature, being quite unnecessary for the purposes of the defence, which amounted to little more than a traverse. It should not have been obtained before notice of trial, or at all events until it was known that the action was effective. The speeches, evidence, and judgment have been all transcribed in full, and it is quite impossible that they were all necessary for the preparation of the defence. The costs of the transcript and perusals should, therefore, be disallowed.

Peterson, for the defendant. Order LXV., r. 27, sub-r. 29, directs the master to allow all costs which "appear to him to have been necessary or proper for the attainment of justice or

for defending the rights of any party," and the Court cannot review the exercise of his discretion: *Oliver* v. *Robins*. (1) A transcript of the judgment and the evidence on which it was based was clearly necessary, and a transcript of the speeches was required in order to follow the evidence.

[SWINFEN EADY J. The master is directed to tax the costs of action. Can he allow the costs of a transcript obtained before action?]

It is a matter of discretion, and he has allowed it. His discretion is not confined to costs incurred after action. The Masters' Practice Notes, Annual Practice, 1904, vol. ii. p. 219, authorize the allowance (inter alia) of item 21—Case to advise before action; item 73—Letter before action; item 94—Instructions for originating summons; and item 124—Special indorsement. In the Chancery Division, counsel's fee for settling writ is usually allowed. (2)

Eve, *K.C.*, in reply. The authorized allowances of costs before action are very limited, and cannot be extended to a transcript of this nature. In any case, the master's discretion may be reviewed on the question of quantum where the item is exorbitant: *Smith* v. *Buller*. (3) It may also be reviewed on the question of principle, namely, that the transcript was premature.

Cur. adv. vult.

Feb. 2. SWINFEN EADY J. (after stating the facts). It will thus be seen that the only case alleged against the defendant was being party or privy to a fraud by Bright. A letter threatening the action was written by the plaintiff's solicitors to the defendant on March 3, 1903. In this letter the plaintiff's solicitors state that they have been consulted "with reference to your conduct in fraudulently assisting the bankrupt to transfer and conceal the whole of his assets for the purpose of defeating his creditors." The defendant's contention is that it was in consequence of this letter that the transcript was bespoken, and preparations made for defending the action so threatened. The transcript is in four volumes, and

(1) (1894) 71 L. T. 636.
(2) See, for instance, *Dunning* v. *Grosvenor Dairies, Ld.*, (1901) 46 Sol. J. 69.
(3) (1875) L. R. 19 Eq. 473, 474.

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has been produced to me, and I have refreshed my recollection of the action, which was tried before me, by looking through it. Ninety-two pages of volume 1, 56 pages of volume 2, and 96 pages of volume 4 consist of the speeches of counsel. The rest of volumes 1 and 2 and the whole of volume 3 consist of evidence. The rest of volume 4 consists of the judgment. Under these circumstances, and having regard to the nature and course of that action, it seemed to me that it was impossible to consider that the great expense incurred in obtaining this transcript and consequent thereon was "necessary or proper for the attainment of justice or for defending the rights of any party" in the present action. I thought that the master must have been under some misapprehension in allowing it, and accordingly I determined to see him upon the matter before disposing of this summons. An interview with the master has shewn that this view was correct. He tells me that the transcript was not produced to him, and that no opportunity was afforded him of seeing the document, the costs of which he was allowing, and that if the matter is sent back to him he will only allow so much of the evidence and judgment as relates to the question whether the defendant was or was not party or privy to the fraud—that is, whether the defendant did or did not, by any conduct of his, assist the bankrupt to transfer or conceal any part of the assets for the purpose of defeating the creditors. In my judgment the defendant ought not to be allowed any greater amount than this; and accordingly I allow the summons, and refer the matter back to the master with a direction to allow only the costs of so much of the transcript of the evidence and judgment as relates to the question whether the defendant was or was not party or privy to Bright's fraud—that is, whether the defendant did or did not by any conduct of his assist the bankrupt to transfer or conceal any part of the assets for the purpose of defeating the creditors. The two consequential items will be proportionately reduced. The defendant is to pay the costs of this application, and the costs will be taxed and set off against any sum payable by the plaintiff to the defendant.

Solicitors: *Wingfield & Blew; W. J. Hunter.*

G. R. A.

In re PURVIS (A Person of Unsound Mind).

In Lunacy.

VAUGHAN WILLIAMS L.J.

1904

Feb. 9.

Lunacy — Practice — Vesting Orders — Direction to transfer Stock — Title of Proceedings—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-s.* 1 (*d*); *ss.* 133, 333—*Rules in Lunacy*, 1892, *rr.* 9, 57, 58; *Schedule, Form* 1.

An order in Lunacy directing a transfer of stock under s. 133 of the Lunacy Act, 1890, should be intituled in the matter of the Lunacy Acts, 1890 and 1891, as well as in the matter of the particular lunacy; but this is not to apply to a case under s. 116, sub-s. 1 (*d*) (of a person who through mental infirmity arising from disease or age is incapable of managing his affairs), where the title contains a reference to the statutes "53 Vict. c. 5, and 54 & 55 Vict. c. 65."

In this case the Master in Lunacy had made an order which contained (among other things) a direction for the transfer into court of certain stock which was standing in the name of the lunatic in the books of the Bank of England. The order was intituled "In the matter of Peregrine Purvis, a person of unsound mind," but without any reference to a statute. The bank objected to acting on the order upon the ground that they would not be protected under s. 333 of the Lunacy Act, 1890, unless the order contained a reference to the Act. An application to compel the bank to act upon the order was heard in chambers by Vaughan Williams L.J. sitting as judge in Lunacy.

Buckmaster, K.C., and *Walters*, for the applicants.
Latham, K.C., and *Howard Wright*, for the bank.

Vaughan Williams L.J., without deciding any question as to the rights of the parties, said: I think it would be expedient that, in future, orders containing a direction made under the authority of s. 133 of the Lunacy Act, 1890, should be intituled in the matter of the Lunacy Acts, 1890 and 1891, as well as in the matter of the particular lunacy; but this is not to apply to cases under s. 116, sub-s. 1 (*d*), where the title contains a reference to the statutes "53 Vict. c. 5, and 54 & 55 Vict. c. 65." (1)

Solicitors: *Marchant, Benwell & Marchant; Freshfields.*

(1) See Schedule, Form 1 (*e*), to the Rules in Lunacy, 1892.

C. A. 1904 *Feb.* 5, 6, 10.

BAILY *v.* BRITISH EQUITABLE ASSURANCE COMPANY.

[1903 B. 2364.]

Company — Alteration of Regulations — Life Assurance Company — Mutual Assurance — Policy-holder participating in Profits—Power of Company to alter Rights of Policy-holder—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 50, 209—*Companies* (*Memorandum of Association*) *Act*, 1890 (53 *&* 54 *Vict. c.* 62), *s.* 1.

The deed of settlement of a life insurance company formed in 1854 provided that the profits should be divided in manner to be directed by a by-law or by-laws made as therein stated, and that any provision of the deed and every by-law might be altered by a by-law or by-laws.

The company had a department called the "Mutual Life Assurance Department," and a by-law made in 1854 provided that the profits of that department, ascertained at a valuation made triennially, should, after deduction of expenses, be divided among the policy-holders in that department.

In 1862 the company was registered with unlimited liability under s. 209 of the Companies Act, 1862.

In 1886 the plaintiff applied for a policy on his own life in the Mutual Department. He made his application in reliance on the statements contained in a printed prospectus issued and circulated by the company. This document stated (inter alia) that the entire profits in the Mutual Department, after deducting the expenses, "are divided among the policy-holders without any deduction for a reserve fund." A policy for 400*l.* was issued by the company to the plaintiff, by which the company covenanted to pay 400*l.* on his death, "and all such other sums (if any) as the company by their directors may have ordered to be added to such amount by way of bonus or otherwise according to their practice for the time being." The policy was made subject to conditions indorsed on it, and in those conditions there was a reference to the deed of settlement and the by-laws, and also to "the documents addressed to or deposited with the company in relation to the within assurance."

In 1903 it was proposed, under s. 1 of the Companies (Memorandum of Association) Act, 1890, to register the company with limited liability, and to substitute a memorandum of association and articles of association for the deed of settlement. The proposed articles provided that 5 per cent. of the profits of the Mutual Department should be carried to the credit of a reserve fund until that fund should amount to 37,500*l.* :—

Held, that the company must be taken to have contracted with the plaintiff that the whole of the profits of the Mutual Department should be divided among the policy-holders in that department, and that the company could not, either under the by-laws or under s. 50 of the Companies

Act, 1862, by an alteration of their regulations affect the right so given to the plaintiff.

Decision of Kekewich J. affirmed.

A company cannot by altering its articles justify a breach of contract. *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656, distinguished. *Punt* v. *Symons & Co.*, [1903] 2 Ch. 506, not followed.

APPEAL by the defendant company against a judgment of Kekewich J., which declared that the company ought to continue to distribute the entire profits arising from the mutual and participating branch of its business (after payment of the proportion of the rateable expenses and of the interest at the rate of 7 per cent. per annum hitherto paid to its members) among the holders of participating policies.

The company was formed, under a deed of settlement dated July 15, 1854, for the purpose of carrying on the business of life and fire insurance. Clause 9 of the deed provided that "the profits of the company shall be ascertained and divided in manner to be directed by a by-law or by-laws." Clause 24 provided that "it shall be lawful for an extraordinary general meeting [of the shareholders] to make by-laws for the government of the company, but such by-laws shall not be valid until confirmed by a subsequent extraordinary general meeting." By clause 56, "Any provisions of these presents and any by-law of the company may be altered, repealed, or suspended by a by-law or by-laws but not otherwise." At an extraordinary general meeting on December 6, 1854, by-laws were made among which were the following: "(2.) That in the beginning of January and July in each year a calculation shall be made of interest upon the amount paid up in respect of each share in the company at the rate of 7 per cent. per annum up to the next preceding December 31 and June 30 respectively, and such interest shall at some time in the months of January and July, to be fixed by the directors for that purpose, be payable to the holders of the shares out of the profits of the company only at the company's chief offices for the time being, but every shareholder shall be entitled to receive interest only from the time of the actual payment of the amount so paid up, notwithstanding the payment by any shareholder of interest for the time any call was in arrear.

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(3.) That in the month of January in the year 1858 and in every subsequent third year a general valuation and calculation shall be made of the whole assets and liabilities of the company, and, after carrying forward such portions (if any) of the expenses of establishing the company as the directors shall consider equitable, the net profits of the company's business shall be ascertained by the actuary under the direction of the board of directors. (4.) That in the month of January in the respective years last aforesaid a calculation shall be made by the actuary of the profits that have arisen in the departments of business in which the assured are to be entitled to participate in profits, and in such calculation a fair proportion of the interest hereinbefore directed to be paid and of the other expenses of the company shall be charged upon such last-mentioned departments, and the profits so ascertained to have arisen from the said last-mentioned departments of business shall be set apart and divided amongst the policy-holders in such departments by the actuary under the superintendence of the directors, and the remainder of the profits of the company shall be divided amongst the shareholders according to the amount of shares held by each, and be paid to them along with the next half-yearly dividend."

By by-laws made in 1893, a quinquennial ascertainment of profits and a like quinquennial division of profits between policy-holders were substituted for the triennial ascertainment and division of profits prescribed by the by-laws of 1854.

The company had a department called the "Mutual Life Assurance Department." The holders of policies issued in this department were entitled to participate in the profits of that department as provided by the above by-law 4. The premiums payable in respect of policies issued in that department were stated in a table called Table A. They were higher than the premiums in respect of non-participating policies.

The company issued and circulated from time to time a printed prospectus, which contained (inter alia) the following statements:—

"Mutual Life Insurance Department. In ordinary mutua societies the public sustain the following disadvantages, which

are here avoided: (1.) Each assurer in such societies is personally liable for the entire engagements of the society; (2.) the policy-holder in such societies loses a large portion of his profits to form a reserve fund, which is in fact so much property taken from his family and put into the pockets of foreign parties; (3.) the frequent alterations of the constitution of such societies involve considerable risk to the policy-holders. In the British Equitable Assurance Company these defects are avoided. (1.) Complete security is given to every policy-holder absolutely without responsibility; (2.) the current expenses of working the company are assessed rateably on the premiums received in the Mutual Life Assurance Department and the general premiums, and the entire profits made by the company in the Mutual Department, after deducting the expenses, are divided among the policy-holders without any deduction for a reserve fund. The policy-holders are thus placed in as good a position the moment they enter the company as if they had been ten years in most other societies. The profits are divided every three years."

Table A was also printed in the prospectus. At the head of the table were the words, "Annual premiums to assure a sum of money at death with profits in addition," and at the foot were the words, "The entire profits divided triennially."

In 1862 the company was registered under the provisions of s. 209 of the Companies Act, 1862, with unlimited liability.

In January, 1886, the plaintiff, having seen a copy of the company's prospectus in the terms above stated, and relying on the statements therein contained, signed a proposal addressed to the company for an insurance upon his own life in the sum of 400*l.* in the Mutual Department. The proposal was made on a printed form, which contained various questions to be answered by the proposer. One of the questions was this: "Are any profits which may be declared to be appropriated by way of addition to the policy, or reduction from the future premiums, or making the policy payable during lifetime?" The plaintiff answered this question, "By way of addition."

On the back of the form of proposal were printed the above-quoted statements in the prospectus and also Table A.

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The company accepted the plaintiff's proposal, and on January 30, 1886, they granted a policy for 400*l.* on his own life, by which they covenanted with him that they would after the expiration of one month, after satisfactory proof of the death of the assured, pay to his executors or administrators the full sum of 400*l.*, "and all such other sums (if any) as the company by their directors may have ordered to be added to such amount by way of bonus or otherwise according to their practice for the time being; provided always that this policy is made subject to the conditions and regulations hereon indorsed."

Among the indorsed conditions were the following:—

"(4.) In case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance . . . . then this policy shall be void.

"(5.) The corporate funds, property, and assets of the company as within mentioned, after satisfying all prior claims and charges, according to the provisions of the deed of settlement and the by-laws of the company for the time being, shall alone be liable for the payment of the moneys payable under the within policy."

The plaintiff paid the yearly premiums in respect of the policy as they from time to time became due.

In April and May, 1903, under the provisions of s. 1 of the Companies (Memorandum of Association) Act, 1890, it was proposed to alter the constitution of the company by registering it with limited liability and substituting a memorandum and articles of association for the deed of settlement, and a petition was prepared for the confirmation of the proposed alteration by the Court.

The proposed articles contained (inter alia) the following clauses:—

"(103.) Unless and until otherwise determined by the company in general meeting, there shall, on every valuation of the assets and liabilities of the life assurance branch of the company's business" (this valuation was by clause 101 to be made every fifth year), "be carried to the credit of a capital call

account a sum equal to 5 per cent. of the divisible profits of such life assurance branch until the sums so carried to the credits of such account shall amount to 37,500*l.*, and then shall, on every valuation of the assets and liabilities of the other branches of the company's business, be carried to the credit of the members' profits account one-half of the divisible profits of such other branches. Subject as aforesaid and to the provisions of art. 104, and unless and until otherwise determined by the company in general meeting, the divisible profits of the whole of the company's business shall be carried to the credit of the life assurance branch and to such fund thereof as the directors shall determine."

"(104.) Unless and until otherwise determined by the company in general meeting, there shall be paid to the members out of the profits of the company a fixed annual dividend of 2*s.* 6*d.* per share, and on the valuation in the year 1904 and in every subsequent fifth year there shall be carried to the credit of the members' profits account a bonus equal to 5 per cent. of the divisible profits of the life assurance branch of the business in the quinquennium ending in such year."

Doubts having been entertained as to the power of the company to alter in this way the rights of the holders of participating policies, this action was brought by the plaintiff, on behalf of himself and the other holders of participating policies, against the company, for the determination of the question.

Upon the hearing of the action upon motion by the plaintiff for judgment, Kekewich J. made the above-stated declaration.

The company appealed.

Warrington, K.C., and *Whinney*, for the company. The question is whether the company has so bound itself by contract with the participating policy-holders that it cannot make the proposed alteration as regards their interest in the profits. The deed of settlement, of which the plaintiff had notice, expressly authorizes the company to alter by a by-law any provision of the deed or any by-law. It is submitted that the prospectus could not bind the company to continue for ever the practice mentioned in it, whatever the nature of their

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business might be. Moreover, by the plaintiff's policy itself the company only covenanted to pay "such other sums (if any) as the company by their directors may have ordered to be added . . . . according to their practice for the time being." The plaintiff must establish a contract between the company and himself. The contract between the company and a policy-holder is to be found in the policy and not elsewhere. When a formal document is executed it contains the final contract between the parties. There cannot be a collateral contract with regard to a subject-matter as to which the formal document is not silent; a collateral contract cannot vary the terms of the formal document.

[STIRLING L.J. referred to *Erskine* v. *Adeane*. (1)]

In that case the collateral agreement did not refer to anything contained in the lease and did not contradict its terms, and it was proved that the tenant had agreed to take the lease in reliance on the collateral agreement.

In the present case the supposed collateral agreement would vary the express provisions of the policy.

Moreover, a company can only contract under its corporate seal. The company cannot vary the terms of a policy entered into with an individual policy-holder by means of some informal transaction before the policy was executed. If the plaintiff is right the Court must hold the company bound by a representation, not of an existing fact, but of a future intention. Under the circumstances the plaintiff is not entitled to prevent the company from altering its regulations, even though he may be prejudiced by the alteration.

The company was compelled to register, and it was registered under s. 209 of the Companies Act, 1862, and, consequently, under s. 50 of that Act it had power, independently of the power given by clause 56 of the deed, by special resolution to alter the regulations contained in the deed of settlement: *Ramsay's Case*. (2) A company cannot deprive itself of this statutory right: *Allen* v. *Gold Reefs of West Africa* (3); *Pepe* v. *City and Suburban Permanent Building Society*. (4)

(1) (1873) L. R. 8 Ch. 756.
(2) (1876) 3 Ch. D. 388.
(3) [1900] 1 Ch. 656.
(4) [1893] 2 Ch. 311.

It is true that in those cases the question arose as between the company and a shareholder, but the principle has been extended to outsiders: *Punt* v. *Symons & Co.* (1) It is essential for the plaintiff, in order to prove that he is entitled to an addition by way of bonus to the amount of his policy, to shew that there was an order of the directors, according to their practice for the time being, that the addition should be made.

P. O. Lawrence, K.C., and *Gatey*, for the plaintiff. No doubt the company has power to alter its regulations; but it is submitted that this does not enable it to take away any part of the profits of the mutual branch from the participating policy-holders and give it to the shareholders, or even to use it for the purpose of a reserve fund. Such a fund will never be divided, but will be retained as capital. The company is now proposing to do the very thing which the prospectus pointed out as one of the disadvantages of other mutual societies, and as one which did not exist in the case of the defendant company. It is admitted that the plaintiff applied for his policy on the faith of the statements in the prospectus, and that he applied for a policy under Table A. An application made on the faith of those statements and accepted by the company constituted a contract between the plaintiff and the company, the performance of which he could specifically enforce. The plaintiff might have to wait till the directors declared a bonus, but still the whole of the profits of the mutual branch are appropriated to the policy-holders in that branch. It is only the mode of division which is to be according to the practice in that branch. The company cannot now go back from the bargain which it has made with the plaintiff. The cases cited shew that a company cannot contract not to alter regulations which it has a statutory right to alter. But that does not apply to regulations contained in a deed of settlement.

Warrington, K.C., in reply. A participating policy-holder in this company is really in the position of a partner in the business carried on by the company: *Re English and Irish Church and University Assurance Society* (2); and if so, the

(1) [1903] 2 Ch. 506. (2) (1863) 1 H. & M. 85, 104.

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company may, as his agents, alter the regulations under which that business is being carried on.

P. O. Lawrence, K.C., in reply, on the case cited in reply. It is submitted that there is nothing in the last point.

Kearns v. *Leaf* (1) shews that to a certain extent a policy-holder can interfere to prevent the insurance company from dealing in a particular way with its assets. But he is nothing more than a contingent creditor, and entitled as such to see that the funds are protected. Here the plaintiff has an express bargain that he shall not be liable for the engagements of the society—that is to say, that he is not to be a partner in the concern: that is clear on the documents.

VAUGHAN WILLIAMS L.J. We ought to settle the form of question for decision. There is only one question, namely, Is the company entitled to alter by-law No. 4 of 1854 to the prejudice of the plaintiff or the other participating policy-holders?

Warrington, K.C. I suggest that the question should be as follows: Whether, having regard to the contractual relation between the company and the participating policy-holders, the company is at liberty to alter the provisions of by-law No. 4 of 1854 in such a manner as to vary the rights of those policy-holders under that by-law.

VAUGHAN WILLIAMS L.J. The question may stand in that form.

We will consider our judgment.

Cur. adv. vult.

Feb. 10. COZENS-HARDY L.J. read the judgment of the Court (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.) as follows:—This is an appeal from the judgment of Kekewich J., who has in effect held that the profits attributable to the participating policy branch of the company's business, after certain undisputed deductions, ought to continue to be

(1) (1864) 1 H. & M. 681.

paid to the holders of participating policies, and ought not to be applied to the creation of a reserve fund or for any other purpose. The defendant company was originally constituted under a deed of settlement in 1854. [His Lordship read clauses 9 and 56 of the deed, and the above-stated by-laws of 1854, and continued:—]

These by-laws, so far as material for the present purpose, were in force in 1886, when the plaintiff effected a policy in the mutual or participating branch of the defendant company. It is admitted that the plaintiff relied upon the statements contained in a prospectus issued by the company, in which the special advantages of the mutual or participating policies are set forth in emphatic language—e.g., whereas in ordinary mutual societies the policy-holder loses a large portion of his profits to form a reserve fund, the entire profits in the defendants' Mutual Department are divided among the policy-holders, without any deduction for a reserve fund. The proposal, which was not before Kekewich J., but which has been admitted in evidence before us, shews that it was for a sum "payable at death under Table A." This language is intelligible by reference to the prospectus, p. 16, which prints Table A with the following words at its head: "Annual premiums to assure a sum of money at death with profits in addition," and the following words at its foot: "The entire profits divided triennially." The premium payable in respect of a participating policy is of course higher than in respect of a non-participating policy. One of the questions in the proposal, applicable only to policies in the Mutual Department, was as follows: "XI.—Are any profits which may be declared to be appropriated by way of addition to the policy, or reduction from the future premiums, or making the policy payable during lifetime?" To which the plaintiff answered, "By way of addition." This proposal was accepted by the company. The actual policy as issued contained a covenant by the company to pay the full sum assured, "and all such other sums (if any) as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." The indorsed conditions

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mention the deed of settlement and the by-laws and the documents addressed to the company, which would include the proposal; but the words I have read are the only words in the policy itself expressly mentioning profits. It has been agreed that the only question upon which our judgment is desired is this—whether, having regard to the contractual relations between the company and the participating policy-holders, the company is at liberty to alter the provisions of by-law 4 of 1854 in such a manner as to alter the rights of those policy-holders to profits.

This being so, it is not necessary to consider whether, apart from such an agreement or admission, there would be any real difficulty in so far connecting the plaintiff's policy with the by-laws and with the prospectus as to identify it with the participating policy described in the prospectus. It must be assumed, therefore, that by-law No. 4 was originally applicable to this policy. Now, under this by-law it is for the directors, with the assistance of the actuary, to ascertain what (if any) are the profits of the participating branch, but the amount so ascertained "shall be set apart and divided amongst the policy-holders" in that department. The directors have no power under the by-law to apply any portion of those ascertained profits to the formation of a reserve fund or to the relief of the shareholders.

It is, however, contended that, as the company was registered under s. 209 of the Companies Act, 1862, it thereby acquired power by special resolution to alter all or any of the provisions of the deed of settlement, not being in the nature of a memorandum of association, and all or any of the by-laws, and that the plaintiff is seeking to restrain the company from altering by-law No. 4 in exercise of this statutory power. And it is said that, apart from the statute, the deed of settlement itself contained a power to alter the by-law, of which power the plaintiff had notice. We cannot assent to this argument. As between the members of a company and the company, no doubt this proposition is to some extent true. The rights of a shareholder in respect of his shares, except so far as they may be protected by the memorandum of association, are by statute

made liable to be altered by special resolution: see *Allen* v. *Gold Reefs of West Africa*. (1)

But the case of a contract between an outsider and the company is entirely different, and even a shareholder must be regarded as an outsider in so far as he contracts with the company otherwise than in respect of his shares. It would be dangerous to hold that in a contract of loan or a contract of service or a contract of insurance validly entered into by a company there is any greater power of variation of the rights and liabilities of the parties than would exist if, instead of the company, the contracting party had been an individual. A company cannot, by altering its articles, justify a breach of contract.

But it is further contended that by the terms of the policy the company are only bound to pay such profits as the directors, "according to their practice for the time being," may order to be added, and that the directors may regulate their practice by reference to a special resolution creating a reserve fund. This argument really involves the proposition that it is competent to the directors to change a participating policy into a non-participating policy. The word "practice" cannot have such a wide meaning. It cannot justify an alteration of rights or the diversion of any part of the profits from the participating policy-holders. In the present case there was a contract for value between the plaintiff and the company, relating to the future profits of a particular branch of the company's business, and the company ought not to be allowed, by special resolution or otherwise, to break that contract. The appeal must be dismissed.

Solicitors: *Henry Gover & Son.*

(1) [1900] 1 Ch. 656.

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1903
Dec. 3, 4.

BRIGG *v.* THORNTON.

[Co. Pal. Lanc. 1902 B. 8936.]

Landlord and Tenant—Lessor and Lessee—Shop—Agreement—Restrictive Covenant—Covenant by Tenant not to carry on other than a specified Business—Covenant by Landlord "not to let" adjoining Premises for a similar Business—Subsequent letting—Overlapping Business—Action against Landlord—Breach of Covenant—Injunction—Damages.

T., the landlord of an arcade containing shops, agreed in writing, binding himself and his "assigns," to grant to B., a "fine art dealer," a lease of one of the shops for a term of twenty-one years, determinable on notice at the end of the seventh or fourteenth year; the lease to contain a covenant by the lessee not to carry on upon the premises any other trade or business than such as was therein specified, including that of an "artistic and heraldic stationer"; and also a covenant by the landlord "not to let any other portion of the arcade for the trade or business hereinbefore mentioned to be carried on by the tenant." B. thereupon entered into possession of the shop and carried on his specified trade or business there.

Subsequently T. let a stall forming part of another shop in the arcade to G., a "bookseller and stationer," on a tenancy determinable on three months' notice, and it was agreed that the tenant should not carry on any business other than that of a librarian, newsagent, bookseller, or stationer. G. then proceeded to sell at his stall certain articles commonly included in a business such as that described in his agreement, but which were also included in a business such as that described in B.'s agreement. G. had notice of B.'s agreement.

In an action by B. against T. and G. for an injunction to restrain T. from "letting" and G. from "using" the stall or any other portion of the arcade for any of the purposes of the business described in B.'s agreement:—

Held, (1.) that T. had committed a breach of his covenant with B. "not to let" for which he was liable in damages, and that although, in the circumstances, an immediate injunction against T. was not necessary, B. might apply for an injunction in the event of any future breach; but (2.) that, as the covenant restrained "letting" only and not "using," B. had no remedy against G. either by injunction or damages.

A restrictive covenant as to the letting or user of property will be construed strictly, and not so as to create a wider obligation than is imported by the actual words: *Kemp* v. *Bird*, (1877) 5 Ch. D. 974.

By an agreement in writing, but not under seal, made October 30, 1901, between the defendants Robert Thornton and James Thornton, builders (thereinafter called "the land-

lords," which expression was to include "their heirs and assigns"), of the one part, and the plaintiff Charles Alexander Brigg, "fine art dealer" (thereinafter called "the tenant," which expression was to include "his executors, administrators, and permitted assigns"), of the other part, the landlords agreed, as soon as the building of such shop should be completed, to grant, and the tenant agreed to take, a lease of the shop then about to be erected by the landlords in the arcade on the north side of Lord Street, Liverpool, as shewn on the plan thereunto annexed and therein numbered 6 and 7, together with the basement under the same, with the use of certain lavatories, for a term of twenty-one years (determinable by the tenant at the end of the seventh or fourteenth year) from the date when the said shop should be fit and ready for occupation by the tenant for the purpose of his business, at the yearly rent of 150*l*. And it was further agreed that the lease should contain various covenants on the part of the lessee, including a covenant "not to carry on upon the premises any other trade or business than that of a dealer in pictures—oil and water-colours—prints, engravings, photographs, etchings, and articles of virtu, artistic and heraldic stationer, frame-maker and dealer in photographic frames, artists' colours, and the accessories to the said trade or business." And, further, that the lease should contain various covenants on the part of the landlord, including a covenant "not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by the tenant."

The shop was duly completed and the plaintiff entered into possession thereof in or about October, 1901, and was still in possession thereof, but no lease had actually been granted pursuant to the agreement.

By an agreement in writing, but not under seal, made September 25, 1902, between the defendants Robert and James Thornton (thereinafter called "the landlords") of the one part, and Charles James Grant, "bookseller and stationer" (thereinafter called "the tenant"), of the other part, the landlords agreed to let to the tenant, who agreed to become tenant of, a stall occupying the whole of the front portion of the shop

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in the said arcade, known as Nos. 8 and 9, the tenancy to commence on October 1, 1902, and to be for a year certain, and thereafter to continue until determined by either party on three months' notice in writing. And it was thereby agreed that "the tenant shall not make any alteration in or addition to the said stall, nor carry on any business other than that of a librarian, newsagent, bookseller, or stationer, without the previous consent in writing of the landlords."

The tenant, C. J. Grant, thereupon entered into the possession of the stall under his agreement, and proceeded to sell there articles, such as wedding cards and ball programmes, coming within the description of "artistic stationery," picture postcards, photographs, Christmas and New Year cards, "best camel-hair brushes," Indian ink, lithographs coloured by hand and other articles of that kind. It appeared also that other persons to whom the defendants, Messrs. Thornton, had let other portions of the shop Nos. 8 and 9, had sold photographic frames and articles of artistic stationery.

The plaintiff complained that the acts of his landlords, the defendants Messrs. Thornton, and of their tenant Grant, were in contravention of the agreement of October 30, 1901, and had caused him considerable damage, and he therefore brought this action in the Palatine Court of Lancaster against Messrs. Thornton and the firm of Charles J. Grant & Son, under which C. J. Grant was carrying on business, claiming an injunction restraining the defendants, Messrs. Thornton, from letting, or allowing to remain let, and the defendants Charles J. Grant & Son, from using or causing or allowing to be used, the premises numbered 8 and 9 in the arcade, or any part thereof, or any other portion of the said arcade, for the purposes, or any of the purposes, of the trade or business described in the above-quoted tenant's covenant in the said agreement of October 30, 1901, and damages.

The defendants, Messrs. Thornton, in their statement of defence, alleged that the stall was not let to Grant for any business other than that of a librarian, newsagent, bookseller or stationer, and that if Grant intended to carry on any other business they had no knowledge of such intention; and with

regard to other portions of Nos. 8 and 9 in the arcade let by them to other persons, they alleged that they were not let for the purpose of carrying on any of the trades or businesses which the plaintiff complained were being carried on there, and that they had no knowledge of any intention to carry on any of such trades or businesses; and they denied that they were in fact so carried on.

The defendants, Charles J. Grant & Son, in their defence denied that the business they were carrying on at their stall included any of the businesses comprised in the covenant in the agreement of October 30, 1901, and contended that the sale of the articles sold by them as above mentioned constituted a part of the business of a librarian, newsagent, bookseller or stationer, and was not either an essential or an important part of the businesses mentioned in the covenant. In the alternative, they contended that if the sale of such articles was an essential and important part of the businesses mentioned in the covenant, they were not in fact carrying on such businesses.

The action was tried before the Vice-Chancellor of the Palatine Court on vivâ voce evidence. Part of the evidence went to the question of notice—whether Grant, or the defendants, his firm, had, at the date of the agreement of September 25, 1902, notice of the agreement of October 30, 1901, and of the restrictive covenant contained therein. Upon that point the Vice-Chancellor thought that the fact that there was a restriction put into Grant's agreement was enough to support a finding that he or his firm knew that the premises in the arcade were subject to a restriction as to the kind of business he might carry on, and that, therefore, he took his tenancy with his eyes open.

Upon the facts as proved, the learned judge came to the conclusion that all the defendants had acted in contravention of the covenant in the agreement of October 30, 1901, and accordingly gave judgment granting an injunction restraining the defendants, Messrs. Thornton, during the continuance of the plaintiff's tenancy under the agreement of October 30, 1901, or of any lease to be granted thereunder, from letting any portion of the arcade, other than the portion thereof

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agreed to be let to the plaintiff, for a trade or business comprising all or any of the trades or businesses mentioned in the tenant's above-quoted covenant in that agreement; also a similar injunction against the defendants, Charles J. Grant & Son against so using the premises; but suspending the operation of the latter injunction for three months, and if the defendants, Charles J. Grant & Son, appealed from that judgment, then further suspending its operation until the appeal should have been disposed of; also an inquiry what damages had been, until that injunction should come into operation, sustained by the plaintiff by reason of the breach, non-performance or non-observance by the defendants, or any of them, of the landlords' above-quoted covenant in the said agreement of October 30, 1901; and an order for payment by all the defendants to the plaintiff of what should be certified to be due to him in respect of the said damages; the plaintiff's costs of the action to be taxed and paid by the several defendants.

From that judgment both sets of defendants appealed separately.

The appeals were heard on December 3 and 4, 1903.

Neville, K.C., and *F. M. Preston*, for both sets of appellants, contended, first, that with regard to the appellants, Messrs. Thornton, the case was not one for an injunction at all, and that there was no authority for holding a landlord liable to pay damages to his tenant in a case of this kind; and, secondly, that with regard to the appellants, C. J. Grant & Son, the plaintiff could have no remedy at all against them, for the words of the covenant in the plaintiff's agreement restrained "letting" only and not "using," and should not be construed as creating a greater obligation than was actually expressed: *Kemp* v. *Bird*. (1) Moreover, at the utmost theirs was merely an overlapping business, in which there was a bonâ fide sale of some articles that might be included in the plaintiff's business; and in such a case the Court would not grant an injunction: *Stuart* v. *Diplock*. (2) The Vice-Chancellor

(1) 5 Ch. D. 974. (2) (1889) 43 Ch. D. 343.

was wrong in holding that Grant & Son had constructive notice of the covenant.

[They also referred to *Tulk* v. *Moxhay* (1), *Fitz* v. *Iles* (2), and *Ashby* v. *Wilson*. (3)]

[ROMER L.J., upon a covenant which is merely personal and collateral, referred to *Formby* v. *Barker*. (4)

STIRLING L.J. referred to *De Mattos* v. *Gibson*. (5)]

P. O. Lawrence, K.C., and *R. B. Lawrence*, for the plaintiff, contended that the defendants, Messrs. Thornton, had clearly committed a breach of their covenant not to let, for which they were liable to the plaintiff; that on the construction of the covenant and on the facts, the defendants C. J. Grant & Son, having at least constructive notice of the covenant, were carrying on a business in breach of it; and that the covenant could be enforced against them as well as against the defendants, Messrs. Thornton.

[They referred to *Tulk* v. *Moxhay* (1); *London and South Western Ry. Co.* v. *Gomm* (6); *Rogers* v. *Hosegood* (7); *Osborne* v. *Bradley* (8); *Attorney-General* v. *Biphosphated Guano Co.* (9); *Nottingham Patent Brick and Tile Co.* v. *Butler* (10); *Ex parte Firth* (11); *Walsh* v. *Lonsdale* (12); *Mander* v. *Falcke* (13); *Holloway Brothers, Ld.* v. *Hill*. (14)]

[STIRLING L.J. referred to *Cuthbertson* v. *Irving* (15) and *Heath* v. *Crealock*. (16)]

Neville, K.C., in reply.

VAUGHAN WILLIAMS L.J., after stating the object of the action and reading the above-quoted clauses in the two agreements, said he agreed with the Vice-Chancellor that the evidence shewed there had been a substantial breach of Messrs. Thornton's covenant with the plaintiff Brigg "not to let any other portion of the said arcade for the trade or business

(1) (1848) 2 Ph. 774.
(2) [1893] 1 Ch. 77.
(3) [1900] 1 Ch. 66.
(4) [1903] 2 Ch. 539.
(5) (1859) 4 De G. & J. 276.
(6) (1882) 20 Ch. D. 562, 582-3.
(7) [1900] 2 Ch. 388, 406.
(8) [1903] 2 Ch. 446, 451.
(9) (1879) 11 Ch. D. 327.
(10) (1886) 16 Q. B. D. 778, 785.
(11) (1882) 19 Ch. D. 419.
(12) (1882) 21 Ch. D. 9, 14.
(13) [1891] 2 Ch. 554.
(14) [1902] 2 Ch. 612, 616.
(15) (1859) 4 H. & N. 742.
(16) (1874) L. R. 10 Ch. 22, 33.

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hereinbefore mentioned to be carried on by the tenant." His Lordship then proceeded :—

Now it seems to me that if one looks at the description of the business in Brigg's agreement and asks oneself the question whether the letting to Grant of the premises for the purpose of carrying on the business of a stationer would be a breach of the agreement not to let any other part of the arcade for the purpose of carrying on the business mentioned in Brigg's agreement, and if there is no qualification of the word "stationer," or no limitation of what may be done under that business, it would be a substantial breach of the covenant to let any other part of the arcade for the carrying on of the said business mentioned in the agreement. When one has once arrived at that conclusion, it seems to me that one has got over the principal difficulty which exists in this case ; but assuming that the letting by Messrs. Thornton to Grant is a breach of their covenant in the Brigg agreement, it is still necessary to deal with the question, What are the remedies of the plaintiff, and moreover against whom has he got those remedies ? Now I think that, if information had come to the plaintiff while this letting to Grant was threatened or in negotiation, probably the plaintiff could have applied to the Court for an injunction, not only to restrain Messrs. Thornton from letting to Grant, but to restrain Grant from taking these premises from Messrs. Thornton in breach of this covenant ; and after the letting to Grant by Messrs. Thornton had become an accomplished fact, the plaintiff could, in my judgment, have asked the Court for a declaration that that letting was a bad letting, and that declaration would have bound both Messrs. Thornton and Grant ; but that is not what happened in this case. The plaintiff has not obtained any such declaration nor any such injunction as I have suggested. The truth of the matter is, that the plaintiff has been content to treat the letting to Grant as an existing fact and not to impeach it. Such an injunction as he has obtained applies merely to the future dealings with the property in the arcade other than that portion let to the plaintiff, and not in particular with the premises which are the subject of the letting to Grant. It seems to me that, under those circum-

stances, the remedy of the plaintiff against Grant, the tenant, is gone altogether. His remedy against Grant, the tenant, does not any longer exist. He cannot get, by any judgment, either damages or an injunction against Grant in respect merely of the user by Grant of these premises. What he can get is a remedy for the breach, not of the covenant as to user, but of the covenant as to letting; and inasmuch as he does not now impeach the letting to Grant, it seems to me that his remedy is merely a remedy against Messrs. Thornton; and the remedy against Messrs. Thornton, so far as this letting to Grant is concerned, is in damages only. No doubt, if there were reason to suppose that there was any likelihood hereafter of a further dealing with any of the property in the arcade in the same way that Messrs. Thornton dealt with the premises in their letting to Grant, there might be an injunction with regard to the future dealing with the property; and, in fact, the Vice-Chancellor has granted such an injunction; but I shall have to say a word in a moment about the necessity for that.

But the primary remedy here in respect of this particular transaction is, in my judgment, that the plaintiff should have damages against Messrs. Thornton for the breach of the covenant not to let; and it seems to me that, since the letting to Grant stands, no damages in respect of that can be recovered by the plaintiff as against Grant.

So much for the damages. With a slight modification, the Vice-Chancellor's direction as to damages can stand, but omitting the reference in it to an injunction, for, in my judgment, there need not be an injunction at all. There is nothing in the facts of this case to lead one to suppose that there will be a repetition of a letting of this sort. In all probability the form which the letting took was a mere slip, and if the parties had been well advised in the transaction the letting might very well have been in such words as would have limited the stationer's business to be carried on by Grant in such a way that, even if there had been an express letting of such a business, it would not have constituted a breach of the covenant not to let any part of the arcade for the business mentioned in Brigg's agreement.

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Under those circumstances, I think no injunction will be necessary. There need only be liberty to apply in the event—which is very improbable—of any attempt hereafter at further letting. It will be sufficient for the present to make simply a declaration that the letting to Grant was a breach of the clause in Brigg's agreement restricting Messrs. Thornton from letting for the business previously mentioned in that agreement; and then should follow a direction for an inquiry as to what damages have been sustained by that breach.

I only wish to add that the damages will be really larger or smaller according as Messrs. Thornton choose to mitigate them. It seems to me that Messrs. Thornton are in such a position as between themselves and Grant that they can mitigate the damages.

ROMER L.J. The parties here have certainly raised, to my mind, a very puzzling question; but the conclusion I have come to is that at any rate the defendants Messrs. Thornton must be held to have committed a breach of their agreement with the plaintiff. [His Lordship then referred shortly to that and Grant's agreement, and also to the evidence as shewing that the business of a "stationer" mentioned in Grant's agreement included a substantial portion of the business described in Brigg's agreement as coming under the head of an "artistic and heraldic stationer." His Lordship then proceeded:—] Upon the whole I come to the conclusion that here the letting by Messrs. Thornton to Grant was a letting to enable Grant to carry on a substantial portion of the trade or business referred to in the agreement with the plaintiff.

Now, that being so, it of necessity follows that there was a breach by the landlord, and there is no doubt that some damage, at any rate, has followed from that letting. I think, therefore, that the plaintiff is entitled to a declaration that the letting to Grant was a breach of the contract with him, the plaintiff, and to an inquiry as to damages. For the reasons put by my Lord it is clearly not a case where there is any necessity for an injunction with regard to future letting. But that, I think, shews the extent of the plaintiff's rights. I

cannot see that he has established any right to hold Grant or the defendants, his firm, liable in this action. The covenant by Messrs. Thornton in their agreement with the plaintiff was only not to let any of the other portions of the arcade for any trade or business referred to in that agreement. Nothing is said purporting to bind the plaintiff's property in the arcade generally in respect of using. Nothing is said as to preventing Messrs. Thornton from permitting a new tenant to use or purporting to bind the property. On the face of it, the covenant is restricted to the form of "not to let." I suppose that, as in the somewhat similar case of *Kemp* v. *Bird* (1), such a covenant as that would not prevent the landlords themselves from carrying on in the arcade business of any kind they chose; and it would not prevent them selling the arcade and the purchaser carrying on a similar business. It is clear from *Kemp* v. *Bird* (1) that in cases like this the Court ought not, on the ground of presumed intention, to extend a covenant such as this beyond what on the face of it is the purpose of it. As was said by James L.J. in *Kemp* v. *Bird* (2), "Persons who are men of business, as they were here, are able to get protection and advice, and they must make their covenants express, so as to state what they really mean, and they cannot get a Court of law or of equity to supply something which they have not stipulated for in order to get a benefit which is supposed to have been intended."

That being so, and finding here simply a covenant to restrain letting, what are the plaintiff's remedies if letting is made or is purporting to be made? If it is threatened and it is an improper letting, he can apply for an injunction. It is possible, though I need not go into detail in considering it, that even after a letting has been effected, if the tenant has notice express or implied (though probably he always would have implied notice), the plaintiff would be entitled to have the letting declared invalid as against him. That may be so: I need not consider that question now; but beyond that his rights do not extend. I find nothing which enables him to say, "There is a letting; I do not apply to set aside that letting: I do not apply to prevent it. It is effective and it is

(1) 5 Ch. D. 974. (2) 5 Ch. D. 976.

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there, and I am not coming to set it aside; but, assuming that the letting is a good letting and stands, I now ask the Court to hold that the tenant cannot use the property under his tenancy except subject to a particular condition." I can find nothing in the covenant in the agreement with the plaintiff which enables the Court to assent to that; and in that respect I think we are bound by the principle of the decision in *Kemp* v. *Bird*. (1)

Now, here the plaintiff does not seek any relief in the way of preventing the letting or repeating the letting as against him. On the contrary, he comes here and he asks for damages against Messrs. Thornton on the footing that there has been a letting, and no doubt he will seek to establish substantial damages possibly as against them on the very ground that the letting has allowed the tenant to carry on the business he, the plaintiff, is carrying on. At least that will be so decided by this appeal.

That being so, it appears now that the plaintiff has no remedy against Grant. He cannot attack him as being bound by any restrictive covenants affecting the user during his tenancy; and, of course, not being a person who has contracted with the plaintiff Brigg, Grant cannot be sued for a breach of covenant.

Under those circumstances there can be no damages, it appears to me, as against Grant, and the action against him ought to have been dismissed with costs.

STIRLING L.J. I am of the same opinion. I agree with the Vice-Chancellor as to the construction which he has put upon the covenant to be inserted in the lease for which an agreement has been entered into between Messrs. Thornton and the plaintiff, and for the reasons which he has given, and which my brethren have given. To these I cannot usefully add anything, but I should like to say one word upon the case as regards Grant, who took his premises from Messrs. Thornton under a subsequent agreement. As regards Grant, the case is based upon the stipulation in the agreement with the plaintiff that the defendants, Messrs. Thornton, would not let any

(1) 5 Ch. D. 974.

other portion of the arcade for the trade or business mentioned to be carried on by the tenant—that is, the plaintiff. We are really asked to read that as if it were a stipulation that Messrs. Thornton would not let or use any other portion of the arcade for the trade or business which was to be carried on by the plaintiff. In my opinion, that is not the fair construction of the covenant. I say so for the same reasons as were given by Fry J. in the case of *Kemp* v. *Bird* (1), which has already been referred to. He says, and I say also here, that the covenant, as it stands, is perfectly "intelligible and reasonable."

In the second place, the construction contended for by the plaintiff creates a much wider obligation than is imported by the strict words of the covenant. The lessors, Messrs. Thornton, might, as I read the covenant, either themselves carry on the same business as the plaintiff upon another part of the arcade, or they might sell part of the arcade for that purpose; and that being so, and the covenant being, as it stands, intelligible and rational, it does not appear to me that there is any reason for reading it as extending to include not merely the letting but the user of the other portions of the arcade. I may point out that if, as I think is the true construction of the plaintiff's agreement, the assigns of Messrs. Thornton are bound (and those include lessees), still the same difficulty arises, because the only obligation upon such an assign is not to let a portion of the premises, and he is not prohibited from using them.

It seems to me, therefore, that the relief which the Vice-Chancellor has given as against Grant is not that to which the plaintiff is entitled. It may be that the plaintiff has failed to protect himself to the extent which he desires, but that does not appear to me a sufficient reason for altering what is the plain construction, in my judgment, of the covenant.

The judgment of the Court was substantially as follows:—

One order on both appeals. Discharge the judgment of the Court below, and in lieu thereof declare that the letting by the appellants, R. & J. Thornton,

(1) 5 Ch. D. 549, 553.

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to the appellant Grant on September 25, 1902, was a breach of the covenant agreed to be contained in the lease agreed to be granted by the agreement of October 30, 1901, to the plaintiff not to let any other portion of the arcade for the trade or business therein mentioned to be carried on by the tenant. Liberty to apply for an injunction to restrain any future breach of the said covenant. Order an inquiry by the registrar what damage the plaintiff is entitled to by reason of the said breach. Order the appellants R. & J. Thornton within four days from the certificate to pay to the plaintiff the amount certified to be due in respect of such damages. Order the appellants R. & J. Thornton to pay to the plaintiff his costs of the action, to be taxed by the registrar, and the costs of the appeal of the defendants R. & J. Thornton to be taxed. Allow the appeal of the defendants C. J. Grant & Son, and dismiss them from the action with costs, both on appeal and below.

Solicitors: *Bremner, Sons & Corlett, Liverpool; C. Garnett, Liverpool.*

G. I. F. C.

C. A. 1904 Jan. 25, 26.

In re GIST (A PERSON OF UNSOUND MIND).

Lunatic — Administration of Estate — Alteration of Character of Property — Repairs — Permanent Improvements — Payment of Expenses out of Personalty — Charge on Realty — Charge for General Costs in Lunacy — Jurisdiction — Discretion — Benefit of Lunatic — Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 118.

In exercising the power given to the judge by s. 118 of the Lunacy Act, 1890, to charge moneys expended or to be expended under his order for the permanent improvement of the property of a lunatic upon the improved property, the judge may take into consideration, not only the benefit of the lunatic personally, but also what is fair and right as between his real and personal estates.

Regard ought also to be had to the nature and extent of the estate and to the difficulty in drawing a clear line between ordinary repairs and permanent improvements.

A new tenant of a farm, part of a large agricultural estate belonging to a lunatic, agreed to take the farm on condition that an old malthouse should be converted into cottages for labourers. An order was made in the lunacy authorizing the committee to carry out the conversion and to pay the expense of it out of the lunatic's personal estate. The work having been carried out and paid for, the next of kin of the lunatic applied for an order charging the expense upon the real estate in favour of the personal estate:—

Held, that this expense might properly be regarded as incurred in the course of the ordinary management of the real estate, and that it ought not to be charged upon the real estate in favour of the personalty.

Under s. 118 there is jurisdiction to order money already expended under a previous order in permanent improvements to be charged on the improved property, but an application for such a charge should be made promptly.

As a general rule, when an order is made authorizing the expenditure of money in permanent improvements, the order should at the same time direct whether the expenditure is or is not to be charged on the improved property, or, if not, the order should be made expressly without prejudice to the question how as between the real and personal estates the expenditure is ultimately to be borne.

Held, also, that an order made by the master charging part of the general costs in the lunacy upon the lunatic's real estate ought to be discharged.

APPEAL against an order made by Mr. Fischer, a Master in Lunacy, in December, 1903, that freehold estates, of which Samuel Gist, a lunatic, was seised as tenant in tail in possession, should stand charged with such sums as the master should certify to have been expended by the committee of the lunatic's estate in permanent improvements on the estate, together with a moiety of the costs, charges, and expenses in the lunacy subsequent to a taxation directed by an order of March 21, 1888, and that a mortgage of the estates for securing to the personal estate of the lunatic the amount of the charge should be made to trustees for the purpose.

This order was made upon a summons taken out by some of the next of kin of the lunatic asking that a sum of 1244*l.* 11*s.* 10*d.*, expended by the committee of the estate upon permanent additions to and improvements of the real estates, together with the sum of 635*l.* 8*s.* 2*d.*, representing a moiety of the costs, charges, and expenses in the matter of the lunacy from March 20, 1888, to the date of the summons, might be a charge, with interest, on the estates, and that a mortgage of the estates might be made to trustees for the purpose of securing to the personal estate of the lunatic the two sums of 1244*l.* 11*s.* 10*d.* and 635*l.* 8*s.* 2*d.* respectively, with interest from the date of the death of the lunatic.

The lunatic had been so found many years ago. He was unmarried. He was tenant in tail in possession of freehold estates of considerable value, situate in Gloucestershire, Worcestershire, and elsewhere, upon one of which there was a

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mansion-house. He was also possessed of considerable personal estate. The rental of the settled estates amounted originally to over 5000*l.* a year, but it had since become reduced, by reason of the fall in the rents of agricultural land, to about 3500*l.*

In the year 1877 an order was made in the lunacy by Baggallay L.J. authorizing the expenditure of a large sum in permanent improvements, and charging that sum or a large part of it upon the estates: vide *In re Gist.* (1) The amount which the summons before Master Fischer sought to charge on the estates was made up of various items which had been expended by the committee of the estate under the authority of several orders in the lunacy, the first of which was made on March 14, 1894, upon the application of the committee. This order gave to the committee liberty to cut and sell timber upon the estate of the lunatic of the estimated value of from 700*l.* to 800*l.*, and also liberty to execute the proposed repairs to the several farmhouses and buildings specified in an affidavit made by the committee, the cost of which repairs was estimated at about 521*l.* 18*s.* 6*d.*, and to expend therein so much as should be necessary of the proceeds of the sale of the timber, to be accounted for by the committee as income in his next account. One of the items of repairs mentioned in the affidavit of the committee was a sum of 150*l.* for converting an old malthouse on one of the farms into cottages to increase the accommodation for labourers. A new tenant had taken the farm on condition that this alteration should be made.

The last of the orders under which the expenses in question had been incurred was made in 1901. In each case the order was made in the presence of the presumptive heir of the lunatic (who was also the next tenant in tail) and of the lunatic's next of kin. Each order directed that the payments should be made out of the personal estate of the lunatic, but did not say whether the payments were to be ultimately borne by the real estate, nor were any of the orders expressed to be made without prejudice to the question how the payments were ultimately to be borne as between the real and personal estates of the lunatic.

(1) (1877) 5 Ch. D. 881.

In support of the summons before Master Fischer an affidavit was made by the solicitor for the next of kin, who also acted as solicitor for the committee of the estate. From that affidavit it appeared that the total amount expended on repairs and improvements under the orders commencing with that of March 14, 1894, was 3010*l.* 8*s.* 10*d.* It was also stated that out of that amount 1244*l.* 11*s.* 10*d.* had been expended on permanent improvements to the estates. In a schedule to the affidavit a number of items were set forth which were said to constitute permanent improvements. Among these items were—60*l.* for converting the malthouse into cottages; 34*l.* 13*s.* 1*d.* for a new pit-wheel on one of the farms; and 121*l.* 17*s.* 6*d.* for a new roof to a barn on another farm.

In giving his decision Master Fischer said that when he made such of the prior orders as were made by him he did not intend that the cost of the improvements authorized should ultimately be borne by the personal estate.

The heir appealed.

Younger, K.C., and *Wace*, for the next tenant in tail, referred to *In re Gist.* (1) The former orders did not reserve the question in what way the expenses and costs should ultimately be borne, but simply directed them to be paid out of the personal estate.

[They were stopped by the Court.]

H. Terrell, K.C., and *Howard*, for the next of kin. It is submitted that the Court has no jurisdiction in Lunacy to charge one estate with expenses incurred on another: *In re Vavasour.* (2) The Court cannot, or at any rate will not, readily alter the nature or character of a lunatic's property by using his personal estate for the purposes of his real estate, and thereby causing the personal estate to go to the heir: *Attorney-General* v. *Marquis of Ailesbury.* (3) At all events, if the Court has power under s. 118 of the Lunacy Act, 1890 (4), s. 27 of the Lunacy Act, 1891, and the Rules in Lunacy, 1892, r. 10, to make such orders as were made in the present case

(1) 5 Ch. D. 881.
(2) (1885) 29 Ch. D. 306.
(3) (1887) 12 App. Cas. 672, 676.
(4) By s. 116, sub-s. 4, of the Act of 1890, "The powers of this Act relating to management and administration shall be exerciseable in the discretion of the judge for the main-

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in 1894 and afterwards, the power will be exercised only under special circumstances.

No reason has been shewn for altering the character of the lunatic's property, and it is submitted that the master did not intend to do so. The orders for payment out of personal estate were intended to be only interim orders, and left the question open how the cost of the improvements was ultimately to be borne. The Court will have regard to what was intended to be decided when an order was made, and if the Court knows that it was not intended to determine something which is in fact determined by the order as drawn up, the Court will rectify the order even after it has been passed and entered: *In re Swire.* (1) And if the order ought to be rectified the Court will treat it as in fact rectified, for it would only be necessary to serve a notice of motion for rectification, as was done in *In re Swire.* (1) But, if the Court has power now to deal with the question how the burden of these improvements should be borne as between the real and personal estates, it would not be necessary to rectify the orders. It is submitted that none of the orders can be construed as dealing with the incidence of the expenses as between the real and personal estates. As to the meaning of permanent improvement, see Wolstenholme's

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tenance or benefit of the lunatic or of him and his family, or where it appears to be expedient in the due course of management of the property of the lunatic."

By s. 118, sub-s. 1, "The judge may order that the whole or any part of any moneys expended or to be expended under his order for the permanent improvement, security, or advantage of the property of the lunatic, or of any part thereof, shall, with interest, be a charge upon the improved property or any other property of the lunatic, but so that no right of sale or foreclosure during the lifetime of the lunatic be conferred by the charge."

[This section is in substance the same as s. 118 of the Lunacy Act, 1853 (16 & 17 Vict. c. 70).]

By the Lunacy Act, 1891 (54 & 55 Vict. c. 65) s. 27, sub-s. 1, "Subject to rules in lunacy the jurisdiction of the Judge in Lunacy as regards administration and management may be exercised by the masters, and every order of a master in that behalf shall take effect unless annulled or varied by the Judge in Lunacy."

By rule 10 of the Rules in Lunacy, 1892, "The masters may make orders as regards administration and management, and they may direct by whom and in what manner the costs of any proceedings are to be paid."

Rule 11 provides for an appeal from the master to the judge.

(1) (1885) 30 Ch. D. 239.

Settled Land Acts, 8th ed. p. 352. An inquiry could be directed as to whether the works in question were repairs or permanent improvements. Sect. 118, it is submitted, gives the Court power to say whether those expenses shall be borne by the real or by the personal estate, and that power was not exercised by the orders which authorized the expenditure. The matter is not res judicata. It is submitted that this expenditure ought to be charged on the real estate in accordance with the rule that the Court will not in general alter the character of a lunatic's property. The order appealed from was really made in the interest of the lunatic, for he is absolutely entitled to the personalty, whereas he is only tenant in tail of the realty.

Independently of sect. 118, the Court has an inherent jurisdiction to alter its own order if it has been made per incuriam: *In re Swire.* (1) And here the master must be taken by the order under appeal to have amended the former orders which did not carry out his intention. The words "in the first instance" or "without prejudice" must have been accidentally omitted in drawing up the former orders.

[VAUGHAN WILLIAMS L.J. referred to the Rules of the Supreme Court, 1883, Order XXVIII., r. 11.]

That rule gives the Court power to correct an error in a judgment or order "arising from any accidental slip or omission."

[VAUGHAN WILLIAMS L.J. I think that refers to an accidental omission made by the ministerial officer of the Court, not to an omission made by the Court itself. The necessity for that rule arose from the fact that the Judicature Act had restricted the power of the Court as to rehearing: *In re St. Nazaire Co.* (2); and the object of that rule was to limit the application of that restriction.

Younger, K.C., referred to *Oxenden* v. *Lord Compton.* (3)

STIRLING L.J. referred to *Attorney-General* v. *Marquis of Ailesbury.* (4)]

(1) 30 Ch. D. 239, 243, 246, 247.
(2) (1879) 12 Ch. D. 88.
(3) (1793) 2 Ves. Jun. 69, 73; 2 R. R. 131.
(4) 12 App. Cas. 672.

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As to the power of the Court to amend its orders, see also *Lawrie* v. *Lees* (1), per Lord Penzance, and *Hatton* v. *Harris* (2), in which case an error in a decree was corrected after a lapse of thirty-nine years.

Moreover, the question how these expenses should be borne is merely a question of administration, and, just as in an administration action, the Court has power to adjust accounts as long as its jurisdiction continues, provided that no injury will be done to any one. If an appeal ought to have been brought from the former orders, the Court can now extend the time for appealing.

Younger, K.C., in reply. Under s. 118 the master had jurisdiction to order these expenses to be borne by the personal estate. The exercise of the jurisdiction is discretionary.

It has been assumed by the applicants that the cost of every permanent improvement, or of that which amounts to a permanent improvement, ought to be borne by the estate which is improved. That is not the law, nor is it the practice in Lunacy. That course had not been always adopted in this lunacy, as shewn by *In re Gist* (3), on which occasion improvements on an estate of which the lunatic was owner in fee were ordered to be paid for out of the personalty. The Court will look at the matter broadly in the interest of the lunatic. In *Oxenden* v. *Lord Compton* (4) Lord Loughborough L.C. held that there was no equity between the real and personal representatives after the death of a lunatic to have property, which was administered by the Court, restored; and that therefore the produce of timber on the estate of a lunatic, cut and sold by order on a report that it would be for his benefit, was personal assets.

[VAUGHAN WILLIAMS L.J. Is Lord Loughborough's judgment altogether consistent with s. 118?]

Sect. 116, sub-s. 4, must be read with s. 118. That section authorizes the charging of permanent improvements on the estate improved or any other estate, but the powers relating to

(1) (1881) 7 App. Cas. 19, 34, 35.
(2) [1892] A. C. 547.
(3) 5 Ch. D. 881.
(4) 2 Ves. Jun. 69; 2 R. R. 131.

management and administration are to be exercised for the benefit of the lunatic and his family.

[VAUGHAN WILLIAMS L.J. Sect. 118 appears to give the Court power to create an equity between the real and personal estates of the lunatic.]

But everything is to be done with a view to his benefit. Primâ facie the cost of ordinary repairs and improvements ought not to be thrown upon the estate which is improved.

[VAUGHAN WILLIAMS L.J. referred to *In re Vavasour*. (1)]

It may be the result of s. 118 to create an equity as between the real and personal estates, but that was not the object. The object was the benefit of the lunatic, i.e., to enable the Court to do that which would be best for the lunatic personally. In *In re Gist* (2) the expenses which were charged on the settled estate were of an extraordinary character. As Lord Macnaghten said in *Attorney-General* v. *Marquis of Ailesbury* (3): "In the ordinary course of managing a lunatic's estate, the Court pays no regard to the interests or expectations of those who may come after, but it is equally well settled that in matters outside the ordinary course of management, it is the duty of the Court so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession." The question what is an "extraordinary" expense must be considered with regard to the real estate, and not with reference to the amount of the personal estate.

[STIRLING L.J. In *In re Harris* (1827), mentioned in Shelford on Lunacy, p. 203, the Lord Chancellor exercised the power vested in him of altering the character of a lunatic's property by ordering that a sum expended in rebuilding a farmhouse should be considered as a charge upon the lunatic's real estate.]

In *Ex parte Phillips* (4) land tax on a lunatic's estate was ordered to be redeemed out of the produce of decaying timber ordered to be cut for payment of debts, Lord Eldon L.C. holding that there was no equity in favour of the next of kin.

(1) 29 Ch. D. 306.
(2) 5 Ch. D. 881.
(3) 12 App. Cas. 688.
(4) (1812) 19 Ves. 118; 12 R. R. 151.

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The orders in the present case were made in the regular course of administration, and were not merely interim orders. The words "moneys expended" in s. 118 refer to expenditure made by the committee without the previous authority of the Court. At any rate the Court ought not to be asked to exercise its discretion when so long a time has elapsed since the expenditure has been incurred. The application for a charge ought to have been made at the time when the Court authorized the expenditure, or very soon afterwards: *Lord Leitrim* v. *Enery*. (1)

[STIRLING L.J. Cannot an order under s. 118 as to the incidence of expenditure for permanent improvements be made after the expenditure has been incurred, if the order authorizing the expenditure did not finally decide how it was to be borne?]

The discretion has in fact been exercised and the expenditure incurred, and it is too late now to ask the Court to alter the orders. The application was really made, not in the interest of the lunatic, who, as the evidence shews, is not likely to live long, but in the interest of the next of kin.

[He was not called on to reply as to the charge for costs.]

VAUGHAN WILLIAMS L.J. The question raised in this case is a rather curious one. The lunatic is the tenant for life in possession of considerable freehold estates. He has been a lunatic for many years, and his property has been administered by the Lunacy jurisdiction. This is not the first occasion on which questions arising in the administration have been brought before this Court. There is one reported decision—*In re Gist* (2)—to which I shall have to refer presently. The question now raised is this. A series of orders have been made in the lunacy with regard to the raising and expenditure of money for the purpose of repairs of one character or another on the settled estates. It is said that some of these repairs were of the nature of permanent improvements. The orders were in such a form that they directed the money to be raised out of the lunatic's personal estate, and it was out of the personal estate that the expenditure was paid. Take, for

(1) (1844) 6 Ir. Eq. Rep. 357. (2) 5 Ch. D. 881.

instance, the order of March 14, 1894. [His Lordship read from that order.] The object of the summons on which the order with which we have to deal was made, and the result of that order, was to charge this expenditure, or part of it, on the real estate, on the ground that the works were in the nature of permanent improvements the cost of which, as between the persons prospectively entitled to the real and personal estates of the lunatic, ought, it is said, to be borne by the real estate. In the course of the argument we have gone to some extent into the authorities before the Lunacy Acts of 1853 and 1890, with regard to the practice of those who had then to administer the jurisdiction in Lunacy, and how far they would in administering a lunatic's estate go into equities as between his heir-at-law and his next of kin. In my view, that practice is not of very great importance now, for, whatever may have been the practice then, it seems to me that it has been modified by the subsequent legislation. In substance, s. 118 of the Act of 1890 reproduces the legislation contained in s. 118 of the Act of 1853. I shall assume for the purpose of my present judgment that whatever may have been the practice or the jurisdiction in Lunacy prior to the Act of 1853, yet after the passing of that Act it was competent to those who administered the jurisdiction in Lunacy to entertain and to dispose of this question as between the heir and the next of kin of a lunatic. In my view of the decision in *In re Gist* (1), it is tolerably manifest that Baggallay L.J. intended to do so. Having to provide for the cost of some repairs and permanent improvements, some of which were in respect of an estate of which the lunatic was the owner in fee, and the others in respect of an estate of which he was tenant in tail in possession, the learned judge dealt in a different way with the repairs on the two estates. As regarded the repairs on the settled estate he directed that the expenses should be charged upon that estate, while as regarded the repairs on the other estate he made no such order, but directed that the expenses should be paid out of the personalty. Under these circumstances the inference which I draw is that the Lord Justice in making that order

(1) 5 Ch. D. 881.

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did take into consideration not only the benefit of the lunatic himself, but also what would be fair as between the prospective owners of the two estates. I assume, therefore, for the purpose of my judgment, that the Court has such a power under s. 118 of the Act of 1890, and that when the order of March 14, 1894, and the other orders were made it was within the power of the judge or master to take these matters into consideration, and to determine the question having regard not only to the benefit of the lunatic personally, but also to what would be fair and right as between the prospective owners of his real and personal estates respectively. I propose to deal with the case upon that footing, and upon the admission of Mr. Younger that he is not prepared to suggest that when these orders were made the master did in fact take into consideration this question of fairness as between the real and personal estates independently of the individual benefit of the lunatic. This being so, if we look at the orders and find that so far as the words go they are consistent with the master not having taken that question of fairness into consideration, I think we ought to see what the Court in Lunacy can properly do in the exercise of its jurisdiction under s. 118. Notwithstanding the decision in *In re Swire* (1), if it had been clear from the orders that the master had dealt with this question at the time when he made the orders, he would, I think, have had no jurisdiction which he could now properly exercise under s. 118. In my opinion, when the jurisdiction conferred by that section has been exercised by the master, and it is manifest on the face of the order that it has been exercised, the jurisdiction cannot be exercised a second time. If that were clear by the former orders in the present case, I think the master would have had no power to make the order with which we are now dealing. I assume, therefore, for the present purpose, that there is nothing in the former orders to shew that the master had then this question of fairness before him. Turning then to s. 118, I think the construction of it is clear, as was pointed out by Stirling L.J. during the argument. In the absence of any prior order in

(1) 30 Ch. D. 239.

the exercise of this jurisdiction, I think the master or judge would have power to exercise it subsequently, i.e., to create a charge on real estate in respect of money already expended under a previous order. But I agree with the view expressed by Sugden L.C. in *Lord Leitrim* v. *Enery* (1) that this jurisdiction ought not to be exercised after a considerable lapse of time. It is a jurisdiction the exercise of which ought to be asked for promptly. As Sugden L.C. said (2): "in general the proper time to decide whether the payment is to have the effect of exonerating the heir-at-law or not, is when the payment is made." In the present case the next of kin have chosen ever since each order was made to stand by and acquiesce in an order which primâ facie threw the incidence of these expenses upon the personal estate of the lunatic, and they ought not to be listened to when at this distance of time they come and ask to have the incidence of these expenses altered by charging them on the real estate. For my own part, I think that, if the lunatic had died before this order had been made, it is very doubtful whether the jurisdiction would have continued. But be that as it may, the next of kin were, in my opinion, too late in making this application.

I should, however, be sorry to decide this case on that narrow ground alone, and it is not necessary to do so. We know from the affidavits the nature of the works which were done under these orders, and it is common ground that the great bulk of the work would properly be paid for out of the personal estate. But with regard to one or two of the items—a very small proportion of the total expenditure—it is suggested that they were in the nature of permanent improvements the cost of which ought to be borne by the real estate. I will take as the strongest instance the conversion of a malt-house into cottages. It is said that this was an extraordinary outlay, and like the purchase of land or the building of a farm-house spoken of by Lord Cottenham L.C. in *In re Badcock*. (3) I cannot agree. It seems to me that in dealing with these matters we ought to take into consideration the magnitude

(1) 6 Ir. Eq. Rep. 357.
(2) Ibid. 369.
(3) (1840) 4 My. & Cr. 440; 48 R. R. 149.

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and the nature of the estate. It may very well be that in the management of a large agricultural estate such as this it would become necessary or proper to expend money upon an improvement which a new tenant might require as a condition of his accepting the tenancy of a farm. In the present case we know from the affidavits what the facts were. An old tenancy of a farm had expired, and a new tenant made it a condition of his becoming tenant that this alteration of the malthouse into cottages should be made. This, as it seems to me, was an expenditure in the ordinary course of the management of the estate, essential to the due receipt of the rents and profits, and one which in the exercise of its discretion the Court will not be disposed to provide for by a charge upon the real estate. This very instance seems to me to shew how unfortunate it would be to allow an alteration of an order of this kind to be made after so long a lapse of time. The Court is really not now in a position to ascertain all the facts about the expenditure. It is worthy of observation that a considerable part of the money which was expended was derived from the proceeds of the cutting of timber upon the estates, and the master may well have thought that in the absence of any objection it was reasonable that this expenditure should be provided for in that way. Having regard to the small proportion to the total expenditure of the items which it is sought to throw upon the real estate, as well as to the lapse of time since the original orders were made, I think we ought not to allow the order now under appeal to stand.

In my opinion the appeal ought to be allowed on the two grounds which I have mentioned: (1.) that the order under appeal ought not to have been made after so long a lapse of time; (2.) that independently of the lapse of time, having regard to the nature of the repairs and improvements, I am of opinion that it would have been perfectly reasonable and proper to order this expenditure to be paid out of the personal estate, if the matter now came before this Court for the first time.

As regards the moiety of the general costs in the lunacy which the master has ordered to be charged on the real estate, it was scarcely contended that in the circumstances s. 118 has

any application. It is hardly possible to divide the costs into two parts, and say that so much related to the real estate and so much to the personal estate. In my opinion the master's order was clearly wrong, and it must be discharged.

STIRLING L.J. I also think that this appeal ought to be allowed. The order of the master gives a charge upon the real estate, of which the lunatic is tenant in tail, in respect of sums of money which under four previous orders have been expended in permanent improvements on that estate. Now the principle on which the Court acts in dealing with the property of lunatics under its care is very clearly stated by Lord Macnaghten in *Attorney-General* v. *Marquis of Ailesbury* (1), where he said: "The leading principle, the paramount consideration, is the interest of the lunatic. Consistently with that principle it is settled that in the ordinary course of managing a lunatic's estate, the Court pays no regard to the interests or expectations of those who may come after, but it is equally well settled that in matters outside the ordinary course of management, it is the duty of the Court so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession." And his Lordship quoted the following passage from the judgment of Lord Loughborough in *Oxenden* v. *Lord Compton* (2), where, commenting on the judgment of Lord Bathurst in *Ex parte Grimston* (3), he said: "If the Chancellor was continually looking to the right and left, and weighing the probable interest of the representatives, the interest of the lunatic would be committed in favour of those, who have no immediate interest, and whose contingent interests are left to the ordinary course of events. Therefore the Chancellor is to administer the estate tanquam bonus paterfamilias, making every advantage fairly to increase and improve it without engaging in risks and dangerous adventures; for those are not fit enterprises. But whatever tends towards ordinary improvement it is strictly the duty of the administrator to do, considering only the immediate

(1) 12 App. Cas. 688. (2) 2 Ves. Jun. 69, 73; 2 R. R. 131.
(3) (1772) 4 Bro. C. C. 235, n.

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interest of the proprietor of the estate. But when I am laying down this so generally, I must be understood to do it with this guard, that great care must be taken, that nothing extraordinary is to be attempted; as estates to be bought, or interests to be disposed of. Alteration of property is as far as possible to be avoided consistently with the idea of preserving the interest of the proprietor." The rule there laid down is that in matters outside the ordinary course of management of the property of a lunatic it is the duty of the Court as far as possible not to alter the devolution of his property. Lord Loughborough gives as an instance the case in which an estate is to be bought or sold, but the application of the rule is not limited to the purchase or sale of property of a lunatic. In *In re Harris* (1), for example, it was ordered that money expended in rebuilding a farmhouse should be charged on the real estate of a lunatic. And in *In re Badcock* (2) Lord Cottenham said that, "if the money were laid out in the purchase of land, or, what would amount to the same thing, in building a farmhouse, it would be right that the sum so laid out should retain its character of personalty; but the case before him was one of ordinary and necessary repairs." Accordingly, it was ordered that repairs to freehold houses, the property of the lunatic, should be done at the expense of his personal estate.

It is sought now by the next of kin to bring the present case within the rule so laid down, so that the Court is asked to say that there has been expenditure of an extraordinary kind, and that under s. 118 there ought to be a charge upon the real estate for the money so expended out of the personal estate. It is to be observed that all these orders were made in the presence of the heir and the next of kin. The next of kin had then an opportunity of pointing out to the master that the expenditure was of an extraordinary kind, and suggesting to him that he should either exercise his jurisdiction by expressly altering the devolution of the property, or leave the matter open for subsequent decision, by making the order in terms without prejudice to the question how the expenditure should ultimately be borne as between the real and personal estates. Nothing of that sort

(1) Shelford on Lunacy, p. 203. (2) 4 My. & Cr. 440; 48 R. R. 149.

was done, but the orders simply directed the committee to expend the money out of the personal estate. That being so, I think the onus was on the applicants to shew that the expenditure was of an extraordinary nature. With regard to that the evidence seems to me of a very shadowy description. The greater part of the expenditure authorized by the orders was unquestionably for ordinary repairs, and there are only a few items which bear any aspect of being of an extraordinary kind. For instance, under the order of March, 1894, the total sum authorized to be expended was 521*l.*, of which 150*l.* was the estimated cost of converting an old malthouse into cottages, one of the terms on which a new tenant agreed to take a farm being that this should be done in order to increase the accommodation for labourers. This was stated in an affidavit made by the committee upon the application for the order. It is very fairly said that the master might well have treated that as an expenditure in the ordinary course of the management of the property, and not one which called for any exercise of discretion on his part. The other instances which have been referred to are even weaker.

Upon the whole I have come to the conclusion that the applicants have not made out that which it was necessary for them to do, namely, that there has been expenditure of an extraordinary nature outside the ordinary course of management of the property; and that being so, it seems to me that the application must fail.

I will only add that if it appeared that the Court had not exercised the power which it undoubtedly has of altering the devolution of the lunatic's property it would, in my opinion, be open to the Court now to make an order under s. 118. But if the jurisdiction has once been exercised and the judge or master has once decided that the character of the property ought not to be altered, the Court cannot go back upon its own decision by making such an order as was asked for in the present case.

COZENS-HARDY L.J. I am of the same opinion. This is not an application for the rectification of the original orders on the ground that they were not what the master intended them to

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be. No application of that kind ought to be listened to. The real question arises under s. 118. It seems to me that that section gives the Court jurisdiction to charge upon the real estate of a lunatic moneys expended under a previous order in permanent improvements on that estate, unless when making the order the judge or master had that section present to his mind and deliberately abstained from exercising the jurisdiction conferred by it. I am not satisfied that any of the four orders which authorized the expenditure is of such a nature as to prevent the Court from now exercising its jurisdiction under s. 118. I do not take the narrow view of that section which has been suggested by counsel for the appellant, namely, that it enables the Court to charge the real estate only when it is for the benefit of the lunatic himself. Such a view of the section is, I think, negatived by the decision of Baggallay L.J. in *In re Gist.* (1) But, assuming that the jurisdiction exists, it is said that there are two grounds which should prevent us from exercising it. One is the delay in making the application. I do not attach much importance to the delay, for I think nothing has been done to alter the position of the parties. But the other consideration which influences my mind is this, that in exercising this jurisdiction under s. 118 regard ought to be had to the nature and extent of the estate. In the present case the lunatic is entitled to a large estate the annual income of which, though it has been reduced, amounts to some 3500*l.* And I think in regard to this that it is almost, if not quite, impossible to draw a clear line between repairs and permanent improvements; and we are asked to say that some items which are on the border line ought to be regarded as permanent improvements, and not as ordinary repairs. I need only refer to three items—(1.) the conversion of the old malthouse into cottages; (2.) putting a new iron wheel in place of a wooden one; (3.) putting a new roof on an old barn. The first is the strongest in favour of the respondents; but it is not plain to me as regards any of the three items that the master might not reasonably have said that the expense was one which the personal estate ought to bear, and that it ought not to be a

(1) 5 Ch. D. 881.

charge on the real estate. I think that generally speaking the master, when making an order authorizing an expenditure upon permanent improvements, should either at the same time take s. 118 into consideration and say in the order in what way the expenditure is to be borne as between the real and personal estates, or expressly state in the order that it is made without prejudice to the question how the expense is ultimately to be borne. If neither of these courses is adopted and the Court is afterwards, as in the present case, asked to exercise its jurisdiction under s. 118, I think a very clear case for so doing ought to be shewn.

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Solicitors: *Routh, Stacey & Castle, for Stapleton & Son, Stamford; Bloxam, Ellison & Co., for Bryan & Helps, Gloucester.*

W. L. C.

In re HANBURY. HANBURY *v.* FISHER.

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[1903 H. 1685.]

Will—Construction—Precatory Trust—Gift Beneficial or in Trust—Absolute Gift "in Confidence"—Gift over in Default of Disposition by Will of Absolute Donee—Validity.

A testator gave, bequeathed, and devised to his wife "the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and, in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces."

The testator left his wife and seven nieces surviving him. He had had no children:—

Held (by Vaughan Williams and Stirling L.JJ., Cozens-Hardy L.J. dissenting), that the widow took the property absolutely for her own benefit, and that no trust was created in favour of the nieces.

Decision of Kekewich J. affirmed.

The use by a testator of the words "in confidence" in connection with an absolute gift is not of itself sufficient to create a trust.

Held, that the gift over in default of any disposition of the property by

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the widow by her will was repugnant to the prior absolute gift to her, and was therefore invalid.

Held, that the word "such" ought not to be implied before the word "disposition."

Per Cozens-Hardy L.J.: Upon the construction of the will as a whole the widow took more than a life interest, and in case all the nieces should predecease her, her absolute interest would remain. But the intention of the testator was that the nieces, if any, who should survive the widow, should take the property in such shares as she should by her will determine, and that, in default of any such disposition by her, the surviving nieces should take the property in equal shares, and effect ought to be given to that intention. The words "in default of any disposition by her thereof by her will," taken in connection with the context, necessarily required the insertion of the word "such" before "disposition."

ORIGINATING SUMMONS raising a question upon the construction of the will of the Right Hon. Robert William Hanbury, M.P.

The will, dated October 31, 1893, was in the testator's own handwriting, and contained the following gift: "I give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and, in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces."

The testator added: "I make this will in full confidence that my dear wife will shew the affection of a daughter to my dear mother and step-father." And, after appointing his wife and Charles Fisher executrix and executor, the testator gave to Charles Fisher "such sum, not exceeding 150*l.*, as my dear wife may decide upon." The testator died on April 28, 1903. He left his wife and seven nieces surviving him. He had never had any children.

The summons was taken out by the widow against the other executor and the seven nieces to determine the construction of the will.

The summons was heard before Kekewich J. on July 10, 1903.

Warrington, K.C., and *Austen-Cartmell*, for the widow, submitted that the gift in the will amounted to an absolute devise and bequest to her, that the expression of the testator's "confidence" was not intended to impose any trust upon her, and that the gift in default of any disposition by her, being repugnant to the preceding absolute gift, could not take effect.

[They referred to *Holmes* v. *Godson* (1), *In re Hamilton* (2), *In re Williams* (3) (attention being drawn to the fact that in the head-note to that case the words "in the fullest trust and confidence" had been erroneously substituted for the words "in the fullest confidence" actually used in the will), *Hill* v. *Hill* (4), *Wright* v. *Atkyns* (5), *In re Adams and Kensington Vestry* (6), *Lambe* v. *Eames* (7), *In re Hutchinson and Tenant* (8), and *Malim* v. *Keighley*. (9)]

Warmington, K.C., and *Christopher James*, for the surviving nieces, submitted that the question was one of the construction of the will as a whole. It was evidently the wish of the testator that, subject to the enjoyment of his property by his wife during her life, his nieces should become entitled. The direction that in default of disposition by the wife the nieces should take was clearly imperative, and there were present in this will all those features, the absence of which was relied on by the Court in *In re Hamilton*. (2)

[In addition to the cases above mentioned they referred to *Shovelton* v. *Shovelton* (10) and *Curnick* v. *Tucker*. (11)]

Mark Romer, for other defendants.

KEKEWICH J. In order to determine what the construction of the will is, I must in the first instance ascertain what its meaning is according to the ordinary use of language, and it seems to me that if it is construed in that way there is, without doubt,

(1) (1856) 8 D. M. & G. 152.

(2) [1895] 1 Ch. 373; [1895] 2 Ch. 370.

(3) [1897] 2 Ch. 12. [The error mentioned in the text is corrected in the errata at p. vii of that volume.—F. P.]

(4) [1897] 1 Q. B. 483.

(5) (1810) 17 Ves. 255; (1815) 19 Ves. 299; (1823) T. & R. 143; 13 R. R. 199; 24 R. R. 3.

(6) (1884) 27 Ch. D. 394.

(7) (1871) L. R. 6 Ch. 597.

(8) (1878) 8 Ch. D. 540.

(9) (1794, 1795) 2 Ves. Jun. 333, 529; 2 R. R. 229.

(10) (1863) 32 Beav. 143.

(11) (1874) L. R. 17 Eq. 320.

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an absolute gift to the wife. There is a gift to her of "the whole of my real and personal estate and property absolutely." If there were no more, no one could doubt about the meaning. But the testator goes on to say this: "In full confidence that she will make such use of it as I should have made myself." I must dismiss from my mind the technical meaning of "confidence" for the purpose of ascertaining in the first instance what the testator meant. I must not regard the fact that the word "confidence" may be used in a technical sense as the equivalent of "use" or "trust." I must regard "confidence" as used here in the ordinary sense in which that word is used among Englishmen speaking their own language. I venture to say that no one, not possessed of technical knowledge, would put upon the word "confidence," standing alone, any meaning other than that which the plaintiff, Mrs. Hanbury, seeks to place on it. When you "confide" in persons you trust them, not trusting them in the technical sense of making them trustees, but leaving to them the power to do what you wish them to do, and being sure that they will fulfil those wishes. The idea of trust in the legal sense is entirely out of the question. That seems to me clear on the use of the word "confidence" alone; but it is enhanced by the words which follow, that the confidence is "that she will make such use of it as I should have made myself." I care not for this purpose whether "it" is, as it certainly is grammatically, the entire property, or whether it is only that of which a person in the ordinary case would make use—that is, the income. The confidence which a dying husband reposes in his wife is exactly expressed, namely, that she will use it as she knows he would have used it. He leaves it to her in that confidence which exists between him and her, and not as defining any particular trust. So far, to my mind, not only is the word "confidence" in favour of Mrs. Hanbury's contention, but the words immediately following support that construction. But then the subsequent words do, no doubt, present some difficulty: "And that at her death she will devise it to such one or more of my nieces as she may think fit": he confides in her to do that. If the confidence means what I hold it to

mean, that expression of his wish really adds nothing. But still there is an expression of his intention that she will dispose of it, or, rather, that she will dispose of it in that particular way among his nieces, and that is emphasized again by the gift in default of any disposition by her, whereby he directs that all his estate and property acquired by her under his will shall at her death be equally divided among the surviving nieces, shewing that the nieces were in his thoughts—that they were persons for whom he desired not so much himself to provide as that his wife should provide. It all depends, therefore, upon whether these words are sufficient to cut down the gift which, according to my construction, is absolute in her favour in the first instance. On reflection I have no doubt that the rule which I ventured to lay down in *In re Hamilton* (1) is sound, and I say so the more confidently because, although there are no words in the judgments in the Court of Appeal in that case actually adopting the language in which I laid down the rule, still there are expressions which shew that the Court of Appeal did not differ from it. But I put that aside, and turn to what Lord St. Leonards said in the passage quoted by Lindley L.J. in the judgment in *In re Williams* (2) from the work on the Law of Property, published in 1849, p. 375: "The law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute gift, has in late times varied from the earlier authorities. In nearly every recent case, the gift has been held to be uncontrolled by the request or recommendation made, or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule, that if a testator really means his recommendation to be imperative, he should express his intention in a mandatory form;" and he adds: "but this conclusion was not arrived at without a considerable struggle." There I find a rule which seems to me to cover this case from the beginning to the end. I have the confidence, the absolute gift in the first instance not controlled by the confidence, and the absence of the mandatory expression of intention which Lord St. Leonards says, according to a not unwholesome rule,

(1) [1895] 1 Ch. 373; [1895] 2 Ch. 370. (2) [1897] 2 Ch. 12, 21.

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ought to be found before the trust is enforced. It seems to me that the cases cited and the principles to be deduced from them cover the present case, and that Mrs. Hanbury takes absolutely.

I must refer briefly to an argument which has been strongly urged. It was said that there was no case in which there was, as there is here, a gift over—that is to say, a gift, in default of the exercise of the power purported to be conferred on the absolute donee, where the precatory trust has not been maintained. That may be so. I have not examined all the cases, but the answer, to my mind, is this: here you have a gift over in these words: "In default of any disposition by her thereof by her will and testament, I hereby direct"—then he directs it to go among the surviving nieces. Is it right on the proper construction of the will to call that a gift over? To my mind it is not. There can be no gift over except in default of the exercise of a power of appointment, which power is valid and exercisable. According to my construction of the will there is no power of appointment; there is no power which is valid or exercisable. The power which he purports to give of devising it among the nieces at her decease is repugnant to the absolute gift and fails, and there is nothing, therefore, which strictly, according to law, is in default of the exercise of the power. That argument, therefore, fails.

The result is, I must find Mrs. Hanbury to be under this will the donee absolutely for her own benefit of all the real and personal estate and property of the testator.

C. C. M. D.

C. A. From this decision the nieces appealed. The appeal came on for hearing on January 29, 1904.

Warmington, K.C., Vernon Smith, K.C., Christopher James, and *Mark Romer,* for the nieces. It is submitted that this is a precatory trust. The desire of the testator, as expressed, is that his nieces should have an interest in his estate. They are to take either under an appointment by his wife by will, or, in default of appointment, absolutely by his own gift. The

principles stated by Jessel M.R. in *In re Bagshaw's Trusts* (1) should be applied to the present case. In considering whether a precatory trust is attached to the gift to the wife, the Court must be guided by the testator's intention apparent in the will, and not by any particular words in which his wishes are expressed: *In re Hamilton.* (2)

A trust in whatever words it is expressed must, of course, be obligatory. If the trust is not performed, there is an implied gift to the persons in whose favour the trust was created. It is submitted that the legal effect of the words of this will is an absolute gift to the wife, cut down by a gift to such of the testator's nieces surviving at her death as she shall select, and in default of appointment by her will, then to all the surviving nieces. The testator does not say "I desire," but "I hereby direct." The whole will must be looked at, especially when, as here, it is a "home-made will," in order to discover what the testator intended: *In re Williams.* (3) In that case Rigby L.J. quoted the following words of Lord Langdale M.R. in *Knight* v. *Knight* (4): "When property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust, first, if the words are so used, that upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain."

The words used by this testator shew that it was his intention that if his nieces survived his wife they should have an interest in his property, either by a will executed by her or by means of his own gift. The judgment of Kekewich J. gives no effect to the final clause of the gift, which he treated as repugnant to the prior absolute gift. The dominant idea in the testator's mind was that his wife should have the unfettered

(1) (1877) 25 W. R. 659.
(2) [1895] 2 Ch. 370.
(3) [1897] 2 Ch. 12, 29.
(4) (1840) 3 Beav. 148, 172; 52 R. R. 74, 85.

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enjoyment of his property during her life subject to this—that his nieces, if they should survive her, should have the property. The absolute interest of the wife is to remain, except so far as it is necessary to cut it down for the purposes of the subsequent trust. Either the wife takes an estate for her life, with remainder to the nieces as she shall appoint, or, if not a life estate, her absolute interest is subject to an obligation to appoint the property by her will among the surviving nieces; and if no appointment is made by her, there is a gift to the surviving nieces; and if at the death of the wife there are no surviving nieces, her absolute interest is to remain. The terms of the gift to the executor are inconsistent with an absolute ownership by the wife.

In the case of a will the latter part, if it is inconsistent with a prior part, will prevail: *Sherratt* v. *Bentley*. (1)

[VAUGHAN WILLIAMS L.J. referred to Williams on Executors, 9th ed. vol. ii. p. 934.]

Haldane, K.C., *Warrington, K.C.*, and *Austen-Cartmell*, for the widow. No doubt the whole of the will must be looked at, but, if that is done, it is apparent that the main idea of the testator was to give his wife an unfettered discretion as to the disposition of his property.

[STIRLING L.J. Any possible construction will involve some departure from the words used by the testator.]

It is submitted that there is one construction which will not do that. The word "devise" is not equivalent to "appoint." "Devise" means dispose of that which is her own. The words "in default, &c.," mean that she is to dispose of what is left after any disposition which she may make in her lifetime. Any other construction would practically amount to giving her only a life interest. The nieces are to take through her devise, not through any trust for them created by the testator.

[VAUGHAN WILLIAMS L.J. If your construction is right, one would have expected the words to be "in default of any disposition made by her during her life or by her will."]

The property is given to her absolutely to make such use of it as she pleases.

(1) (1833) 2 My. & K. 149, 157; 39 R. R. 168.

[STIRLING L.J. Do not the words "in full confidence" impose some restriction?]

Those words express the motive of the absolute gift. If the wife has not made any disposition inter vivos the property is to go in the way which the testator indicates. He intended his wife to be the judge. It is suggested that there is an absolute gift to the wife, but if there are any surviving nieces the property is to go to them, the wife having a power of selection. That construction departs from the words. It is submitted that there is no trust for the nieces as the wife may appoint, and there is no power of appointment. If the appellants are right, the wife could not during her life dispose of anything—not even a cash balance at the bank. The testator has in fact attempted, after giving the property to his wife absolutely, to say how the property shall go if she does not make a will. That is a provision which the law will not allow, and it is invalid, being repugnant to the prior absolute gift: *Holmes* v. *Godson*. (1) A gift over in default of the exercise by the donee of one of the rights inherent in the interest given to her is repugnant and void. If the wife has a general power to devise, the expression of "confidence" is only the expression of a hope that she will devise the property in a particular way. In giving that meaning to the word "confidence" effect is given to every word of the will. The word "direct" is no doubt imperative as a matter of construction, but it must be rejected as being repugnant to the prior absolute gift.

Vernon Smith, K.C., in reply. The testator did not contemplate that his wife should make any disposition of the property during her life; she was only during her life to make such use of the property as he would have done himself. The ultimate gift over is not in default of her making a will generally, but only in default of her making a will in favour of the nieces. The word "such" should be implied before "disposition." The testator meant that if there were any surviving nieces his wife was not to have a general power to dispose of the property by her will, but only a power of disposition among the nieces.

Cur. adv. vult.

(1) 8 D. M. & G. 152, 159.

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Feb. 2. VAUGHAN WILLIAMS L.J. read a judgment, in which, after stating the will, he continued:—I will for the purposes of my judgment first assume that the words in this will, following the words "in full confidence," do not, having regard to recent decisions, constitute a trust in favour of the nieces. Now, if that is so, the main question which we have to decide is whether the words "and, in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces," impose a condition which is repugnant to the previous absolute gift, or whether those words should be construed as creating an executory devise or gift over after an absolute gift. Now, in the first place, if you read the words from "I give and bequeath" down to the word "absolutely," and omit the words from "in full confidence" down to, but exclusive of, the words "and in default of any disposition, &c., among the surviving said nieces," it seems to me impossible to construe those latter words as creating an executory devise or gift over, or otherwise than as repugnant to the absolute gift and devise to the wife. It was argued that, if we take into consideration the words "in full confidence . . . . that at her death she will devise it to such one or more of my nieces as she may think fit," this justifies us in reading the words "in default of any disposition by her thereof by her will and testament" as if they were, "in default of any *such* disposition," and it is said that if we do this the direction "in default of such disposition" really constitutes a devise or gift over in favour of the nieces who shall survive the widow. In the first place, the words are not "any *such* disposition," and, in my opinion, it cannot be said that there is anything in the will which renders it necessary to interpolate the word "such," except the fact that the words of the will, read as they stand, contain a direction inconsistent with the law, founded on principles of public policy, which says that, in the event of an owner in fee dying intestate, the estate shall go to his heir, and in the case of personal property to his next of kin; or, to put it shortly, contain a direction which defeats the course of

devolution which the law provides as incident to an absolute interest. My observation is, of course, quite apart from the question whether the words of this will taken as a whole create a trust binding on the conscience of the widow as owner in fee of the realty, or absolute owner of the personalty. *Holmes* v. *Godson* (1), and in particular the judgment of Turner L.J., seems to me, properly applied, to govern the present case and to justify thus far my conclusion. Now is there a trust in favour of the nieces? The law appears to me now to be this—that a gift, followed by such expressions as "in full confidence," will not by mere force of the words create a trust. You must take the will which you have to construe and see what it means—see, that is, what is the intention of the testator as expressed in his will, and then answer the question, aye or no, according to the intention of the testator as expressed by his will. I will first deal with the considerations arising on this will which favour the trust, and then with the words which go to negative it. The words "in full confidence that she will make such use of it as I should have made myself" favour a trust, because they suggest that the wife is not to dispose of the corpus, but to keep it till her death; but this is a very lame mode of expressing that which is really inconsistent with the ordinary use of the word "absolutely," which primâ facie in a will means unfettered in respect of any condition or trust. Next we have the words "I hereby direct," which are certainly consistent with a trust, but it may be observed are inconsistent with the word "absolutely." Lastly, there is the bequest, "I give to Charles Fisher such sum, not exceeding 150*l.*, as my dear wife may decide upon." This can hardly be said to favour a trust otherwise than in the sense that it goes to negative the absolute property of the widow. But I cannot think that there is really anything in this point, especially as the sentence, taken as a whole, is evidence of the wish of the testator that his wife's discretion should control everything. I think I ought to add in favour of the trust that there does not seem to me to be any uncertainty of fund or object. On the other hand, the word "absolutely" certainly goes to negative a trust imperative on the widow, and the words "in

(1) 8 D. M. & G. 152, 159.

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full confidence," in immediate collocation with the word "absolutely," go to emphasize that word, as if the words had been, "in full confidence nevertheless that my very dear wife will use the property as I should have done." I cannot easily bring myself to the conclusion that this form of words would be used by any one who at the same time intended to impose an obligation on his wife. Again, the words "in default of any disposition by her thereof by her will or testament" seem to me unnatural if a trust was intended, although, of course, they are not so absolutely inconsistent with the trust as they would have been if the words had been "any disposition," omitting the words "by her will or testament." Then the testator directs that "all my estate and property acquired by her under this my will shall be divided," &c., which looks very like an attempt by him to control the disposition of property which he had intended she should absolutely acquire under his will. Again, he uses in the clause relating to the personal relations of his widow with his mother the words "in full confidence," when he obviously could not have intended to create a trust. Then there is the general form of the will, which seems to me to exclude any intention by the testator to bind his wife by imperative obligations. In the case of a gift of money to his sister, where he did intend an imperative obligation, he carefully excludes that money from the property which is to go to his wife absolutely.

On the whole, I think there is no trust, and no executory devise or gift over, but merely a forgetfulness by a testator, who intended to give to his wife an unfettered absolute property, of the rule of law which prevents him when he has made such a gift from controlling the subsequent devolution of the property thus acquired by his gift. I ought to add that I have considered that part of the argument in which it was contended that, according to the true construction of this will, the wife took a life estate with a power of appointment, and I think that that cannot be supported. The result is that the judgment of Kekewich J. will be affirmed.

STIRLING L.J. I have come to the same conclusion, and substantially for the same reasons; but, having regard to the

difference of opinion which unfortunately exists in the Court, I think it is right that I should state in my own way the reasoning which has brought me to take the view which I have just expressed.

We have to deal with a will which is the workmanship, as I understand, of the testator himself, or at all events of some one not skilled in the law, and certainly it is expressed in such a way as to give occasion to great difficulty in ascertaining the real meaning of the testator. He begins with a disposition which is absolutely clear if it stood by itself: "I give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely"; but later on there are words which appear strongly to indicate an intention that in certain events the property so given to the widow absolutely should go over to his surviving nieces. He says that in a certain event, to which I shall refer in a moment, "I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces," and, to my mind, the real question which we have to deal with is, What is the event on which that gift over was to take place? It was admitted by the learned counsel for the nieces that, if the will had run thus, "I give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely," and that had been followed by the words, "and in default of any disposition by her thereof by her will or testament I hereby direct," and so forth, the gift in default of any disposition of the property by the wife by her will or testament would be repugnant and void in law. In my opinion that admission was well founded, and is in accordance with the law laid down in *Holmes* v. *Godson*. (1) It was admitted, on the other hand, by the learned counsel for the widow, that if the will had run thus, "I give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely, and, if any one or more of my nieces shall survive my said wife, then at her death to such one or

(1) 8 D. M. & G. 152.

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more of them as she shall by will select, and in default of such selection to all my said surviving nieces in equal shares," the gift over in favour of the surviving nieces would have been perfectly good, and would have taken effect by way of executory devise and bequest in the event of any niece surviving. An example of such a gift is to be found in *Crozier* v. *Crozier*. (1)

Now the argument for the nieces consisted substantially in an endeavour to bring the case under the last category to which I have referred. They are, however, met with this great difficulty, that the event on which the testator has in terms said that the property acquired by his wife is to go over is not the event of any of the nieces surviving his widow, but the event of his widow failing to make any testamentary disposition. To escape from this difficulty it was said that the will must be read as a whole, and that weight must be given to the clause of which up to this point I have not taken any notice, namely, "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit." Unquestionably the whole will must be read together, and that clause must be taken into consideration. It was then contended that, this being done, the will ought to be read as if the word "such" had been inserted before the word "disposition," so that the gift would take effect only in the event of the testator's widow failing to dispose of his property by will in favour of one or more of the surviving nieces. I confess that during the argument I was much impressed by this contention, and, if I thought that this really expressed the intention of the testator, I should have been very willing to give effect to it. But, after careful consideration, I cannot find enough in this will to enable me so to hold. The insertion of the word "such" appears to me entirely to alter the complexion of the will, and to afford an indication that the testator's intention was that the widow should not be at liberty to make a testamentary disposition of his property except in favour of one or more of the surviving

(1) (1873) L. R. 15 Eq. 282.

nieces. Reading the will as it stands, and by the light of the view taken by the majority of the Court of Appeal in *In re Williams* (1), as to the effect to be given to such expressions as "in full confidence," I am unable to find that the testator has given such an indication.

It appears to me that all the testator intended to do was to provide against the possible intestacy of his widow, and that he has in this respect made a mistake as to the law—a mistake which is not infrequently found in the testamentary dispositions of persons who prepare their own wills.

In my opinion, therefore, the appeal fails.

COZENS-HARDY L.J. This case affords a striking instance of the difficulty of construing a will drawn by a layman, although at the first glance the language used seems clear and free from ambiguity.

The testator was a man of large property, real and personal. He left a wife, but he had no child. Among his nearest relations were his nieces. It is apparent that he was minded to benefit his wife, in whom he had "full confidence." It is equally apparent that he desired that such of his nieces as should survive his wife should, directly or indirectly, derive benefits under his will.

Now it is contended on the part of the widow that the gift to her is absolute and free from any trust, condition, or gift over, and that, in so far as the testator has expressed a "confidence" that she will devise her absolute property in a particular way, no binding effect can be attributed to it, and that the final direction in the event of her not making any disposition thereof by will is repugnant and void: vide *Holmes* v. *Godson*. (2)

On the part of the nieces it is contended that there is a clear gift on the widow's death in favour of the surviving nieces equally, subject to a power of appointment by will given to the widow enabling her to distribute the property between the nieces in different proportions.

(1) [1897] 2 Ch. 12. (2) 8 D. M. & G. 152.

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Upon the whole, I think the widow's contention cannot prevail. I do not doubt that she takes more than a life interest. Should all the nieces predecease her, her absolute interest will remain. But the surviving nieces, if any, are sufficiently indicated as the persons to take after her death. Effect can be given to this overriding intention without unduly straining the language.

There are several points which tend to support this view.

In the first place, the testator seems to have contemplated that, although his widow would "use" the property, it would remain intact at her death. In saying this, I of course do not refer to things quæ usu consumuntur. Use and enjoyment, as distinguished from disposition of the capital, is what the testator's words indicate. This alone would not suffice to cut down or destroy her primâ facie title as absolute owner, but it cannot be wholly disregarded.

In the second place, the words "that at her death she will devise to such one or more of my nieces as she may think fit" do not necessarily import a disposition by her of her own property, but may well be read as an appointment by her of his property. No technical words are required for either the creation or the exercise of a power, if the intention is clear.

In the third place, the words "in default of any disposition by her thereof by her will" seem from the context necessarily to require the insertion of the word "such" before "disposition."

In the fourth place, there is the positive direction that, in the event of what I have called the special power of appointment not being exercised by the wife, all the property shall be equally divided among the nieces. You are not left, as frequently happens, to imply a gift, or to hold that the wife is bound to make an appointment. This express gift is the most distinguishing feature of the case.

Lastly, I attach some slight importance to the final legacy to Charles Fisher of "such sum, not exceeding 150*l.*, as my dear wife may decide upon." If she were the sole and absolute owner of the whole property, why this limit of 150*l.*? If the

other view is adopted, there is an intelligible reason for the form of this bequest. Not more than 150*l.* is to be taken away from the capital to which the nieces may become entitled.

The result is that, though, I need not say, not without considerable doubt, I do not find myself able to agree with the judgment of Kekewich J., or with the judgments of my brethren Vaughan Williams and Stirling L.JJ.

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Solicitors: *Walker, Martineau & Co.; Patersons, Snow & Co.*

W. L. C.

Applied. Re FENTEM (*decd.*). [1950] 2 All E.R. 1073.

In re CHAPMAN. PERKINS *v.* CHAPMAN.

[1903 C. 1439.]

C. A. 1904 *Feb.* 19.

Will—Construction—Forfeiture Clause—Words of Futurity—Limitation to Events after Testator's Death.

The rule recognised in *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, that a forfeiture clause in a will, providing that, in the event of alienation by or the bankruptcy of a legatee, his interest under the will "shall thenceforth cease and determine," applies to acts of forfeiture after the date of the will in the testator's lifetime as well as to acts after his death, ought not to be applied to any but those particular acts of forfeiture, and ought not, in the absence of express words, to be extended to other acts of forfeiture, e.g., a marriage of a kind forbidden by the testator.

Though primâ facie words of futurity in a will point to events happening after the execution of the will, and not merely to events happening after the testator's death, that primâ facie meaning may be controlled by the context.

A testator by his will gave benefits to his sons and daughters, and declared that "if any son or daughter shall" alienate his or her interest or become bankrupt, or "shall contract any marriage forbidden by me," then and in any such case "his or her share . . . . shall thenceforth cease and determine." The testator declared that "the marriages forbidden by me are in the case of a son or daughter marrying with a person of any degree of kindred, unless more remote than third cousin, and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will."

After the date of the will and during the lifetime of the testator one of his daughters married her first cousin:—

Held (by Vaughan Williams and Stirling L.JJ., Cozens-Hardy L.J.

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dissenting), that, as regarded the forbidden marriages, the will shewed an intention that forfeiture should take effect only in the case of a marriage after the testator's death, and that consequently the daughter had not forfeited her interest.

Decision of Kekewich J. reversed.

APPEAL from a decision of Kekewich J. as to the effect of a forfeiture clause in a will.

Edward Chapman by his will, dated March 24, 1881, devised and bequeathed his real and personal estate to trustees (of whom his wife was one) upon trusts for sale and conversion and investment of the proceeds, and to hold the investments upon trusts for the benefit of his wife and children. The will contained the following clauses: "And I declare that if any son or daughter of mine shall do or suffer any act whether by way of alienation, charge, or otherwise, and including any act under any statutes of bankruptcy or for the relief of insolvent debtors for the time being, by reason or means whereof any part or share of him or her in any income or capital of my said estate to or of which he or she shall not have already become entitled in possession or be for the time being actually entitled to the receipt, shall or but for this present clause would become wholly or in part vested in or payable to any other person or persons, or if he or she shall contract any marriage forbidden by me as hereinafter expressed, then and in any such case his or her share, right, title, and interest of, in, and to my said trust estate and the income thereof shall thenceforth cease and determine, and my said trust estate shall thenceforth go and be held in such manner as the same would have been held if he or she had died before me without leaving any child or children living at my death. And I declare that the marriages forbidden by me are in the case of son or daughter marrying with a person of any degree of kindred unless more remote than third cousin, and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will, or if more than two of a majority of them."

The testator died on December 23, 1902.

On November 9, 1886, one of the testator's daughters married her first cousin, Charles S. Perkins.

On May 8, 1903, a summons was taken out by Mrs. Perkins (whose interest under the will was for her separate use) for the determination of the question whether by her marriage she had forfeited her interest under the will.

The defendants were the widow and three sons of the testator, who were the then four trustees of the will, the sons being also beneficiaries.

Kekewich J. held that the plaintiff had forfeited her interest. He said that the decision of the Court of Appeal in *Metcalfe* v. *Metcalfe* (1) shewed that the forfeiture clause would apply to an alienation after the date of the will during the testator's life. And, there being but one forfeiture clause in the present will, the clause must equally apply to a marriage after the date of the will during the testator's life.

The plaintiff appealed.

Upjohn, K.C., and *E. Clayton*, for the plaintiff. It is submitted that the forfeiture clause, so far as regards forbidden marriages, applies only to marriages taking place after the death of the testator. The latter part of the clause, which makes a marriage contracted by a daughter without the consent of the trustees a ground of forfeiture, must necessarily apply only to marriages after the testator's death, for, until the will came into operation by his death, there would be no trustees to give their consent. The former part of the clause should be construed in the same way. This view of the construction of the clause is confirmed by the words of forfeiture themselves. On the happening of the specified events the interest of the son or daughter is "thenceforth to cease and determine." That points to the cesser of an interest already acquired, and no interest could be acquired by a son or a daughter until after the testator's death. It is true that, as regards forfeiture by reason of bankruptcy or alienation, it is well settled by a series of cases that such words of futurity apply not only to events happening after a testator's death, but also to events happening between the date of his will and his death, the ground of those decisions being that the object of the clause was to secure

(1) [1891] 3 Ch. 1.

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that the property should be personally enjoyed by the legatee. That does not apply to a forfeiture in the event of a forbidden marriage. That the rule is well settled as regards forfeiture upon bankruptcy or alienation is shewn by *Metcalfe* v. *Metcalfe* (1), where the former decisions are referred to. It is, however, pretty plain from what was said by the Lords Justices in that case that, unless they had been bound by authority, which they evidently followed with reluctance, calling the construction an unnatural one, they would have held that there was no forfeiture by reason of a bankruptcy occurring in the testator's lifetime. But if the clause must by reason of authority be held to operate retrospectively in the case of alienation or bankruptcy, it does not follow that it must operate retrospectively in the case of a different event. The same words in one clause may operate differently as regards different subject-matters: *Forth* v. *Chapman*. (2) The natural meaning should be given to the words unless there is some authority which constrains the Court to give a different meaning. In the case of forfeiture on bankruptcy or alienation there are such authorities, but there are none as regards forfeiture in another event, such as a forbidden marriage. The natural meaning of the words of forfeiture is that they apply only to events happening after the testator's death, and this is confirmed as regards forbidden marriages by their including in the case of a daughter marriage without the consent of the trustees. That event must necessarily happen after the testator's death.

Levett, K.C., and *J. F. Iselin*, for the sons. The argument for the appellant in effect assumes that a will speaks as from the death of the testator, not only as regards the property comprised in the will, but for other purposes also. That, however, is not the effect of s. 24 of the Wills Act: *Bullock* v. *Bennett*. (3) The operation of words of futurity in a will is not necessarily limited to the date of the testator's death; primâ facie they operate as from the execution of the will. The reasonable conclusion is that the testator intended to exclude any child who married a first cousin, and the natural meaning of the

(1) [1891] 3 Ch. 1. (2) (1720) 1 P. Wms. 663, 667.
(3) (1855) 7 D. M. & G. 283.

word "shall" is "shall after the day on which I am executing this will." It is submitted that it would be a strange and impossible construction to hold that, if a daughter married a first cousin during the testator's lifetime, she would not forfeit her interest; but, if she did so after his death, she would forfeit her interest. The testator's object was to prevent his children marrying within a certain degree of kindred, and for that purpose it could make no difference whether he himself was alive or dead when the marriage took place.

In *Trappes* v. *Meredith* (1) it was in effect held that "shall become bankrupt" included "shall have become"; and in *Metcalfe* v. *Metcalfe* (2) the Court of Appeal felt that they were bound by that decision. Here there is one clause of forfeiture, and it ought to be construed as speaking from the same date with regard to all the acts of forfeiture mentioned in it. If the clause must be treated as retrospective for one purpose, it should be treated as retrospective for all. *Ancona* v. *Waddell* (3) turned upon the annulment of a bankruptcy.

W. A. Russell, for the widow.

Upjohn, K.C., in reply. If a daughter married in the testator's lifetime without his consent he could, if he wished to do so, make a codicil excluding her from any benefit under his will. Except as regards the property comprised in a will, the date from which it speaks is a matter of construction.

VAUGHAN WILLIAMS L.J. The question which we have to determine is, really, from what date the forfeiture clause in this will speaks.

Now it was decided in *Bullock* v. *Bennett* (4) that s. 24 of the Wills Act, which provides that a will is to be construed as if it had been executed immediately before the death of the testator, applies only to the property comprised in the will, and therefore in the present case no argument can be founded upon that section. We are left, therefore, in the same position as we should have been before the Wills Act. Now I go a step further than the decision in *Bullock* v. *Bennett*. (4) There was

(1) (1871) L. R. 7 Ch. 248.
(2) [1891] 3 Ch. 1.
(3) (1878) 10 Ch. D. 157.
(4) 7 D. M. & G. 283.

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before the Wills Act an old rule as to the time from which a will should speak with regard to personalty, namely, that it should speak as from the death of the testator. And, as it was decided in *Bullock* v. *Bennett* (1) with regard to s. 24, that rule applied only to the property comprised in the will. We must, therefore, look at this will and see from what date it speaks. But, having said that, I feel that the true proposition is this—that when you have the date of a will, either on the face of the will or possibly ascertained by evidence, when the testator uses words of futurity, primâ facie those words should be read as speaking from the date of his making his will, and not from the date of his death. That may be a strong presumption; but, if there is a presumption one way or the other, I think that is the more likely. But I do not think that much matters. We are entitled, indeed bound, to look at this will and construe its clauses, and see from what date the testator intended the words of futurity in this particular clause to speak. In my opinion there is ample evidence in this will to shew that the testator intended that these acts of forfeiture should be acts occurring after his death.

I need not go through all the clauses about which we have heard very cogent arguments. But, speaking shortly, the two instances of the user of words (there are a great many more) in this particular clause which struck me most, as indicating that the testator intended that the acts of forfeiture should be acts committed after his death, were (1.) the words "then and in any such case his or her share . . . . of my trust estate and the income thereof shall thenceforth cease and determine," and (2.) the words relating to the marriage of a daughter without the consent of the trustees. There is one forfeiture clause, and there is first the provision for forfeiture on alienation or bankruptcy, or on contracting any marriage forbidden by the testator as thereinafter expressed. Then the testator declares that the marriages forbidden by him are, in the case of son or daughter, marriage with a person of nearer kindred than third cousin, "and also in the case of a daughter marriage contracted without the previous written consent of the

(1) 7 D. M. & G. 283.

trustees or trustee for the time being of this my will." I think, as I have already said, that there is amply sufficient here to shew that the testator meant that the acts of forfeiture should take place after his death.

If that is so, there is an end of the case, and the appeal must be allowed. But I wish to say a word or two about the cases. Our attention has been called to *Metcalfe* v. *Metcalfe* (1), which was decided by Lindley, Bowen, and Fry L.JJ. Lindley L.J. began his judgment by saying (2): "The first question on the appeal is whether the language of this forfeiture clause has any application to a bankruptcy which took place before the death of the testator. If we only look at the words of the clause, there would seem to be a difficulty in construing it so as to include a bankruptcy commencing before the testator's death—that is, before the will came into operation." In my judgment, Lindley L.J. meant that the words of the will were such as to lead to the conclusion that the testator intended only acts of forfeiture occurring after his death, and there were various things in the will pointing to such an intention, some of them very much resembling the matters to which I have called attention in the present will. Having come to that conclusion, the Court proceeded to inquire whether the decision in *Trappes* v. *Meredith* (3) applied—a decision which, as I understand it, related exclusively to the particular act of forfeiture constituted by alienation or by bankruptcy—and they held that, notwithstanding the date from which the will was intended to speak, they were bound by the decision of the Court of Appeal in *Trappes* v. *Meredith* (3) (overruling the judgment of James V.-C.) to hold that, at whatever time that particular act of forfeiture took place, whether antecedently or subsequently to the date from which the forfeiture clause was intended to speak, it would deprive the legatee of the benefit conferred on him. In my opinion that decision ought not to be applied to any act but that particular act of forfeiture; and indeed, if that Court had had to deal with the present case, they would, so far as I can judge

(1) [1891] 3 Ch. 1. (2) [1891] 3 Ch. 4.
(3) L. R. 7 Ch. 248.

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from their judgments, have arrived at the same conclusion as I do.

The result is (1.) that, in my opinion, this clause refers only to marriages taking place after the death of the testator as those upon the happening of which the forfeiture is to take effect; (2.) there is nothing in *Metcalfe* v. *Metcalfe* (1) which applies to such a case. In my opinion the decision in *Metcalfe* v. *Metcalfe* (1) applies only to the particular act of forfeiture with which the Court was then dealing. It follows that, in my opinion, this appeal should be allowed.

STIRLING L.J. I am of the same opinion, but I confess that I have felt very great difficulty in dealing with the case. The testator, having conferred benefits on sons and daughters, has introduced a forfeiture clause, upon the construction of which the whole question turns. The acts which are to occasion forfeiture are of two classes. The first is that of alienation or bankruptcy. The second class is the contracting of any marriage forbidden by the testator as afterwards expressed in the will. And the effect of the commission of any such act is that "in any such case his or her share . . . . of . . . . my said trust estate and the income thereof shall thenceforth cease and determine, and my said trust estate shall thenceforth go and be held in such manner as the same would have been held if he or she had died before me without leaving any child or children living at my death." Now, if there had been no authority bearing on the question, I should have said that the language of the gift over of the share on the occurrence of any such event as is mentioned in the prior part of the clause, namely, "shall thenceforth cease and determine, and my said trust estate shall thenceforth go and be held in such manner as the same would have been held," would be strong to shew that the testator was referring only to the occurrence of such an event after his own death. But it seems to me that as regards acts of alienation, including bankruptcy, it is not open to us to come to that conclusion. In *Metcalfe* v. *Metcalfe* (1) there was equally strong language, which seemed to point to

(1) [1891] 3 Ch. 1.

acts of forfeiture occurring after the testator's death, and yet the Court of Appeal held—it may be they did so reluctantly—that the forfeiture clause applied to acts done in the testator's lifetime. Therefore, as to that portion of the forfeiture clause in this will, I think we are not at liberty to say that the events contemplated were merely those occurring after the death of the testator. But what was the ground of the decision in that case and in those which preceded it? I think the ground is this—that a somewhat unnatural construction has been put on the language of the will, "in order to give effect," as Lindley L.J. said (1), "in such cases to the obvious intention of the testator, which is to secure the personal enjoyment by the legatee of the property left by the will."

I now turn to the other class of cases in which the testator prescribes that a forfeiture shall take place—that is, "in case any son or daughter shall contract any marriage forbidden by me." What, then, are the marriages which are forbidden? The testator says: "And I declare that the marriages forbidden by me are in the case of a son or daughter marrying with a person of any degree of kindred unless more remote than third cousin, and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will." It is said that we ought to follow the decisions with reference to alienation or bankruptcy, and that it is as obvious on the face of this will that it was the testator's intention that a child contracting a forbidden marriage should be deprived of the benefits given to him as that in the case of alienation or bankruptcy the child should only enjoy personally the property given to him by the will. I cannot agree. The testator provides, not merely for the contracting of marriages within a certain degree, but also, in the case of a daughter, for a marriage contracted without the previous written consent of the trustees. It is urged that it would be an extraordinary result that a son or daughter who in the testator's lifetime contracted a marriage within the prescribed degree of kindred should not forfeit the benefit given to him, while a child who after the testator's death did

(1) [1891] 3 Ch. 4.

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so would forfeit his interest. That is no doubt a forcible observation. But it seems to me that another observation which was made in answer has no less force, namely, that, upon the terms of this will a daughter who in the lifetime of the testator contracted a marriage without his consent would not forfeit her share, while a daughter who after his death contracted a marriage without the written consent of the trustees would forfeit her share. Having regard to this peculiarity in the clause, I can see no sufficient reason why, in construing the will, so far as it relates to forfeiture in the event of a forbidden marriage, we should not give effect to the language as fairly construed. Therefore, I think that the daughter who in the testator's lifetime married within the forbidden degree has not forfeited her share.

COZENS-HARDY L.J. Although I have the misfortune to differ from my learned brethren as to the result of this appeal, I entirely agree as to the principles which ought to be applied.

Primâ facie a will speaks from the date of its execution, except as regards the property comprised in it, but there may be a context sufficient to shew that this rule is not applicable. It is a matter of construction whether a particular clause is intended to speak and operate only from the death of the testator and not from the date of the execution of the will. My doubt is simply whether there is in this will a context sufficient to justify the conclusion that this clause was intended as regards forbidden marriages to speak from the testator's death. The clause in question is a clause of forfeiture, and it strikes me as a strange result to hold that one part of the clause is retrospective and the other part is not. We have been asked to read the clause as though it were, "If any son or daughter becomes bankrupt after the date of this my will or marries a first cousin after the date of my death," then there shall be a forfeiture. I cannot accept that view. Being, as we are, bound to hold that any bankruptcy or alienation after the date of the will would bring the forfeiture clause into operation, it seems to me that we ought to arrive at the same conclusion in the case of a forbidden marriage contracted after the date of

the will, and before the testator's death. If, therefore, the decision rested with me, I should say that the judgment of Kekewich J. was correct.

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Solicitors: *Ward, Perks & McKay; John F. Child.*

W. L. C.

In re DOWDING'S SETTLEMENT TRUSTS. GREGORY *v.* DOWDING.

KEKEWICH J. 1904 *Jan.* 14.

[1903 D. 1411.]

Settlement—Covenant to Settle after-acquired Property—Construction—Life Interest—Annuity.

A covenant in general terms to settle after-acquired property does not include a life interest or an annuity, in the absence of any indication in the settlement of a specific intention to include such interests.

Accordingly, where a marriage settlement contained a covenant that all real and personal property to which the wife should during her coverture become entitled, whether in possession, remainder, or otherwise, should be transferred to the trustees of the settlement upon trust for sale and conversion and to hold the proceeds upon the trusts of the settlement:—

Held, that an annuity acquired by the wife during her coverture was not caught by the covenant.

White v. *Briggs*, (1848) 22 Beav. 176, n., and *Townshend* v. *Harrowby*, (1858) 4 Jur. (N.S.) 353, followed.

Scholfield v. *Spooner*, (1884) 26 Ch. D. 94, distinguished.

ADJOURNED SUMMONS.

By a settlement dated May 5, 1886, and made on the marriage of the Rev. W. B. Dowding and Margaret Dowding (then Margaret Carwithen), certain property was brought into settlement by the husband, and certain other property was brought into settlement by the wife's father, the Rev. W. H. Carwithen, and both these properties were settled upon trust for the husband for life, then for the wife for life, and then for the children as the husband and wife should jointly appoint. The settlement then provided as follows: "And it is hereby agreed that all real and personal property, if any, not hereinbefore settled to which the said Margaret Carwithen at the

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time of the said intended marriage or at any time during her intended coverture shall be or become entitled whether in possession, reversion, or otherwise (except jewels, trinkets, ornaments of the person, plate, linen and china, furniture, prints, books, or other articles of the like nature, and also except any legacies or other property acquired at one and the same time not exceeding in amount or value the sum of 100*l.*) shall, so soon as circumstances will admit and at the cost of the trust estate, be assured and transferred by the said Margaret Carwithen and all other necessary parties, if any, unto the said trustees upon trust at such time and in such manner as they shall think fit (but as to any reversionary interest not until it shall fall into possession) [to] sell and convert into money such part of the said property as shall not consist of money or of investments of the nature hereinbefore authorized, and shall stand possessed of the said investments and of the moneys to arise from such conversion as aforesaid upon the trusts and with the powers hereinbefore declared concerning the wife's trust funds, and in the meantime and so long as any property hereby agreed to be settled shall remain unsettled upon trust to pay the rents and income thereof to the person or persons and in the manner to whom and in which the income of the trust funds shall for the time being be payable and applicable under the aforesaid trusts."

The Rev. W. H. Carwithen by his will dated August 20, 1894, devised and bequeathed all his real and personal estate upon trust for sale and conversion, and upon trust out of the net income thereof to pay to his daughter Margaret Dowding an annuity of 40*l.* for her life, to be paid quarterly as therein mentioned; and by a codicil dated August 4, 1896, the testator gave to her an additional annuity of 60*l.* a year. The testator died on April 11, 1903.

On August 10, 1903, the trustees of the marriage settlement took out an originating summons against Mr. and Mrs. Dowding and the infant children of the marriage to determine whether, under the covenant to settle after-acquired property in the settlement, Mrs. Dowding was bound to transfer the two annuities bequeathed to her by her father to the

trustees of the settlement, and, if so, whether the annuities ought to be treated as capital or income under the settlement.

H. T. Method, for the trustees of the settlement, cited *Scholfield* v. *Spooner*. (1)

T. T. Method, for the husband and wife. A covenant to settle after-acquired property, though framed in the widest terms, does not apply to an annuity or life interest, because the property does not fit the trusts of the settlement, and the Court will not hold that property enjoyable for life shall be turned into corpus, so that the tenant for life will only have the income arising from its investment: *Townshend* v. *Harrowby* (2); *Duncan* v. *Cannan* (*No.* 2) (3); *St. Aubyn* v. *Humphreys* (4); *White* v. *Briggs*. (5)

If it is intended to include an annuity or life interest in a covenant of this kind, the practice is to insert a special trust providing that the annuity or life interest shall be held in specie and applied as the income of the settled funds: Davidson's Conveyancing Precedents, 3rd ed. vol. iii. Pt. II. p. 730. *Scholfield* v. *Spooner* (1) turned upon the special language of the settlement. The draftsman specially referred to annuities, and excepted them from the trust for conversion, but omitted to declare any trust relating thereto; but the Court held that there was sufficient in the deed to cover an annuity acquired during the coverture. *In re Crawshay* (6) and *Fyfe* v. *Arbuthnot* (7) also support my contention.

Further, these annuities fall within the words of the second exception, "Any legacies or other property acquired at one and the same time not exceeding in amount or value the sum of 100*l.*" For many purposes an annuity is treated as being a legacy.

S. B. L. Druce, for the infant children of the marriage.

[KEKEWICH J. I need not trouble you on the question whether these annuities are within the exception.]

The cases in which it has been held that a life interest is

(1) 26 Ch. D. 94.
(2) 4 Jur. (N.S.) 353.
(3) (1855) 21 Beav. 307.
(4) (1856) 22 Beav. 175.
(5) 22 Beav. 176, n.
(6) [1891] 3 Ch. 176.
(7) (1857) 1 De G. & J. 406.

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not within a covenant of this kind must be taken to be overruled by *Scholfield* v. *Spooner*. (1) That case did not turn upon the peculiar language of the deed. The judgments of Cotton and Fry L.JJ. are conclusive on the question whether the general words in this covenant, "all real and personal property," include this annuity. The annuity must be sold, and the proceeds invested in accordance with the trusts of the settlement. [He also referred to *In re Hewett*. (2)]

T. T. Method, in reply. *Scholfield* v. *Spooner* (1) was not intended to overrule the previous cases, because Bowen L.J. expressly recognises the rule on which I rely. That is the rule referred to by Kindersley V.-C. in *Townshend* v. *Harrowby*. (3) That case is well known to conveyancers, and it is discussed in Davidson's Conveyancing Precedents, 3rd ed. vol. iii. Pt. I. p. 216.

KEKEWICH J. The question is whether two annuities given to a married lady are caught by a covenant to settle after-acquired property contained in her marriage settlement. It is a covenant though it is in the form of an agreement; it is executed by all the parties, and it is a covenant by all. The covenant is in the widest possible terms: "All real and personal property, if any, not hereinbefore settled to which the said Margaret Carwithen at the time of the said intended marriage or at any time during her intended coverture shall be or become entitled whether in possession, reversion, or otherwise." There are certain exceptions which I must notice for two reasons: first, because it is said that one of these exceptions includes these annuities, so that they are literally excepted from the operation of the covenant; secondly, because it is always necessary where there are exceptions to a general provision to see what is regarded as excepted in order to gain light as to what is intended to be included: "Except jewels, trinkets, ornaments of the person, plate, linen and china, furniture, prints, books, or other articles of the like nature, and also except any legacies or other property acquired

(1) 26 Ch. D. 94. (2) [1894] 1 Ch. 362.
(3) 4 Jur. (N.S.) 353.

at one and the same time not exceeding in amount or value the sum of 100*l.*" It is said that these annuities are legacies within that exception. For some purposes, no doubt, an annuity is a legacy—a legacy payable by instalments; and if that were the right view to take in this case, the instalments are less than 100*l.*, so that no part of them would be settled. But an annuity is not a legacy for all purposes, and in ordinary phraseology an annuity is distinct from a legacy. A legacy is a sum which the legatee is entitled to have paid down; an annuity is a sum which is to be secured by setting apart a portion of the settlor's personal estate, and has to be paid in the shape of an annual payment; and in that sense it is not a legacy. In my opinion it would be entirely wrong to hold that these annuities were legacies within the exception. Then the question is whether these annuities are covered. They are in words: "All real and personal property to which the said Margaret Carwithen at any time during the said intended coverture shall be or become entitled." Of course I am bound to construe these words according to the intention of the parties, and it may appear that the intention presumed or proved in some way or other may shew that these annuities are not meant to be caught; but the words themselves are large enough. Nor is it right to say that annuities, according to the ordinary practice of those who draw marriage settlements, cannot be included in covenants to settle after-acquired property. On the contrary, Mr. Method confirmed my own impression that the ordinary precedents of covenants to settle after-acquired property do include annuities and life interests; but where the draft is properly settled, there is a direction that annuities and life interests shall be held for the benefit of the husband or wife, as the case may be, and possibly with the addition where they are for the benefit of the wife "for her separate use without power of anticipation." Therefore, apart from one authority, which I will deal with presently, where the question was as to a life interest being included, there is no doubt that an annuity may be properly included. There is nothing foreign to the purpose of a covenant to settle after-acquired property in including an annuity. In

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one sense, therefore, the covenant fits the property, or the property fits the covenant. The difficulty arises from this—that the trust is for conversion; that that which is really the life interest of the wife is to be converted by the sale out and out of the annuity, or possibly by investing the annuity when it is received from time to time, and that is to be capitalized, so that the wife or the husband who takes the first life interest would only receive the dividends. That is where the pinch occurs. You can make the covenant fit the annuity, and you can make the annuity fit the covenant; but it does not fit it as it stands—that is to say, it does not fit it according to the ordinary practice of mankind; and it goes against one's general knowledge of what is done on these occasions to say that that which is an annuity is to be capitalized and only to become a dividend-earning fund. Several cases have been cited in which this question has been discussed. A great difficulty of this kind occurred in the case of *Lewis* v. *Madocks* (1), which has given rise to a certain amount of discussion from time to time. There the husband gave a bond with a condition to settle all the personal estate that he should at any time during the coverture be possessed of. Lord Eldon L.C. pointed out the difficulty of executing the instrument, but thought that he was constrained by the general words of the bond, and declared that the personal estate of which the husband was possessed during the coverture was liable to the bond. This, in so many words, would appear to include every sovereign that came into his purse during the coverture, and it did occur to me when the question came before me in *In re Bendy* (2) that the Lord Chancellor meant that where a general covenant of that kind came before the Court it was the duty of the Court to execute it, however absurd it might be, and however great the practical difficulty might be in giving effect to it. But in a similar case before Romer J.—*Finlay* v. *Darling* (3)—he differed—and I have no doubt differed soundly—from the view which I took of Lord Eldon's decision in *Lewis* v. *Madocks*. (1) After observing that that was a covenant by the husband to settle

(1) (1803) 8 Ves. 150; 7 R. R. 10.
(2) [1895] 1 Ch. 109.
(3) [1897] 1 Ch. 719, 722.

the whole of his personal estate however acquired, he said: "Lord Eldon pointed out in that case even that income which the husband received would not be bound by the covenant; but he did say that if that income became capital, then the capital that accrued to him would be bound. I do not know that that decision went so far as that, but certainly there is a statement of Lord Eldon to that effect. In the first place I think that his observation must have been limited in its application to the case immediately before him, which, as I pointed out, concerned and dealt with a covenant of a substantially different kind from the covenant before me; and, secondly, I am not sure that Lord Eldon did not mean by the word 'capital' capital which was so held by the husband as to shew that he intended it to become part of his personal estate which was bound by his covenant." I quote that as shewing that there may be a way out of a covenant of that kind, and that Romer J. thought that Lord Eldon meant to get out of it in that way, although his language was more general, and that he himself would have been able to do so. *Lewis* v. *Madocks* (1) was referred to by Lord Romilly in his judgment in *St. Aubyn* v. *Humphreys* (2), although apparently not cited in the argument. In *St. Aubyn* v. *Humphreys* (2) there was a settlement by the husband of all his personal estate to which he was then or might thereafter become entitled in trust for himself for life, with remainder absolutely to his wife. That, as regards the subject-matter of the settlement, was not unlike the bond in *Lewis* v. *Madocks*. (1) It was held not to comprise his interest in a fund bequeathed to him for life with remainder to his children. All that the Master of the Rolls says is: "Upon consideration of the case of *Lewis* v. *Madocks* (1), and of *White* v. *Briggs* (3) mentioned to me by Mr. Bagshawe, I am of opinion that I must hold, &c.," and he held that the life interest was not caught by the settlement. The judgment of the Master of the Rolls, therefore, is of no value of itself. He looked at *Lewis* v. *Madocks* (1), and read that with *White* v. *Briggs* (3), and thought that he

(1) 8 Ves. 150; 7 R. R. 10. (2) 22 Beav. 175, 177.
(3) 22 Beav. 176, n.

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was bound by authority to hold as he did. I have not the advantage of the independent judgment of the Master of the Rolls, but I have the advantage in a note to that report of the decision in *White* v. *Briggs*. (1) That in my opinion is a case of great importance. There there was a covenant by the husband to settle one moiety of the property he should acquire during the coverture upon the usual trusts. It was in quite general terms. It was held not to include his life interest in property bequeathed to him for the benefit of himself and his family. Some little account is given there of the nature of the bequest. There was a direction under a will to settle property on the husband and his family. That gave rise to a good deal of litigation, and ultimately Lord Cottenham determined that that direction meant that the husband took a life interest only. (2) Then the reporter tells us this—that the Lord Chancellor afterwards declared "that the interest which Charles Herbert White took under the will was not subject to the covenant contained in his marriage settlement." Therefore we have a distinct decision of Lord Cottenham, than whom there could not possibly be a higher authority, that a covenant by the husband to settle after-acquired property framed in the most general terms did not include a life interest given to him by will; and the Master of the Rolls followed that. I say nothing about *Duncan* v. *Cannan* (*No.* 2) (3), because in my opinion that was a case of a different character. Then I was referred to a case before Kindersley V.-C.—*Townshend* v. *Harrowby*. (4) There the Vice-Chancellor had to deal with a covenant framed in the broadest possible terms to settle the wife's after-acquired property, and one of the questions was whether a life interest was covered by it. The Vice-Chancellor expressed a decided opinion upon it. He says: "It appears to me that the whole scope of such a clause as this, (assuming it in the strongest way against the lady), holding her to be covenantor, and holding her to be the person who is to do the act (5), that it is beyond the principle upon

(1) 22 Beav. 176, n.
(2) 2 Ph. 583.
(3) 21 Beav. 307.
(4) 4 Jur. (N.S.) 353, 355.
(5) *Sic* as reported.

which the Court has interpreted such clauses, to hold that that applies to a mere life interest. It appears to me that if Lord Townshend had himself covenanted in the same terms as in this clause, the Court would not hold that the covenant applied to a mere life interest—an interest limited to his life—so as to say that that life interest must be turned into corpus; that each annual or half yearly payment on that life income was to be assigned over to the trustees to be capitalized, so that he, as tenant for life under the settlement, would only have the income arising from the investment of each successive sale as it accrued due from the property. I consider, therefore, that the life interest to the separate use of Lady Townshend is not affected by this covenant. If it had been an absolute interest to her use, I should consider it was affected; but being a mere life interest, it does not signify whether it is to her separate use or not. It appears to me that it is not within the letter of the covenant." That is a distinct finding by a most experienced judge that a life interest is not within a covenant in general terms to settle after-acquired property. Unless there is some authority to the contrary overruling the decision of Kindersley V.-C., and differing from the decision of Lord Cottenham, I am bound to hold that a covenant of this kind does not cover a life interest. What is there to the contrary? I can see nothing in any one of the cases cited which touches those authorities. The case mainly relied on is *Scholfield* v. *Spooner* (1); but before dealing with that case I ought, perhaps, to mention a case before North J. which was cited to me: *In re Crawshay*. (2) That does not really touch this case, because North J. declined to try the question whether any life interest was affected by the covenant in that case, and he held that the particular life interest in that case was not affected because it was not assignable. *Scholfield* v. *Spooner* (1) deserves more attention. On the covenant in that case there can be no question that the framer of the covenant contemplated including in it annuities and life interests, but by some curious omission there was no trust declared of those annuities and life interests when assigned to the trustees, and it was argued

(1) 26 Ch. D. 94. (2) [1891] 3 Ch. 176.

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in the Court of Appeal that because there were no trusts declared, therefore the Court could not hold the annuity there in question to be included in the covenant at all. To that there was a conclusive answer. This annuity was clearly intended to be included in the covenant, and therefore it must be brought within the settlement and held upon some trusts or other. If there were no trusts declared, then they were to be found by proper construction of the document. That is the substance of the decision. It is perfectly true that in the course of the judgments there are expressions shewing that an annuity may be properly included in a covenant of that kind. Fry L.J. distinctly says so. In that case there were apt words, and it was obviously intended that the annuity should be included. There is no objection to an annuity or a life interest being included. *White* v. *Briggs* (1) and *Townshend* v. *Harrowby* (2) were not cited in *Scholfield* v. *Spooner* (3), and it does not touch the question raised in this case, which is this: Whether where the covenant is framed in general terms and there is nothing in the settlement to bring in an annuity or life interest specifically, the inclusion of an annuity or life interest is consistent with the general intention of the parties in making the settlement.

It seems to me that I am in the same position as that in which Lord Romilly found himself, except that I am more strongly bound. He was bound by *White* v. *Briggs* (1); I am bound by *White* v. *Briggs* (1) and *Townshend* v. *Harrowby*. (2) There is no case the other way, and I must hold that strong and general as the words are—quite strong enough by themselves to include an annuity or a life interest—yet having regard to the general intention of the parties, these annuities are not covered by the covenant.

Solicitor for all parties: *Nicholas Hanhart.*

(1) 22 Beav. 176, n. (2) 4 Jur. (N.S.) 353.
(3) 26 Ch. D. 94.

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In re SPARK'S TRUSTS. SPARK *v.* MASSEY.

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[1903 S. 4221.]

Separation Deed—Settlement on Children of Marriage—Resumption of Cohabitation.

By a separation deed the husband assigned property belonging to him to a trustee upon trusts for the wife for life, and after her death for the benefit of the existing children of the marriage. The husband and wife subsequently resumed cohabitation :—

Held, that the settlement in favour of the children was not affected by the resumption of cohabitation.

Ruffles v. *Alston*, (1875) L. R. 19 Eq. 539, followed.

ADJOURNED SUMMONS.

By a deed described as articles of agreement made on February 25, 1893, between John E. H. Spark of the one part, Mary Edith, his wife, of the second part, and Henry R. S. Massey of the third part, reciting that the husband had been guilty of adultery and other misconduct towards his wife, and in order to prevent proceedings being taken against him by her, and as a condition of a mutual separation which had been agreed upon between them, and also in consideration of the wife taking the care and custody of the three children of the marriage, the husband had consented to enter into the following agreement and the wife the following covenant, the husband thereby as beneficial owner assigned to Henry R. S. Massey all that his share and interest under the will of his late grandmother Hannah S. Bewsher (save a sum of 200*l.* and a sum sufficient to pay the costs of and incidental to that assignment), upon trust to pay the annual interest and proceeds thereof to the wife for her life, and from and after her decease to divide the same equally between such of the said children as should attain the age of twenty-one years, or being daughters marry under that age; and in consideration of such assignment the wife thereby covenanted not to molest the husband or to compel him to pay directly or indirectly for the maintenance

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of herself or the said children; and the parties mutually agreed to execute any further deed that might be necessary.

The agreement was carried into effect, and the three children of the marriage remained in the custody of Mrs. Spark; but before the end of 1893 Mr. and Mrs. Spark became reconciled and resumed cohabitation, and three more children of the marriage were born.

The share of Mr. Spark under the will of his grandmother was received by the trustee and (after making the deductions mentioned in the articles of agreement), had been invested, and was of the present value of 1425*l.* 0*s.* 6*d.* or thereabouts; and the income was from time to time paid to Mrs. Spark.

Mr. and Mrs. Spark, being desirous of making a provision for their younger children, on or about November 14, 1903, applied to the trustee asking him to transfer the fund to the husband on the ground that, by reason of the resumption of cohabitation, the agreement had come to an end; and this summons was thereupon taken out by the trustee Henry R. S. Massey as plaintiff, against John E. H. Spark and his wife and children as defendants, to obtain the opinion of the Court whether the plaintiff might properly transfer the funds now representing the property comprised in the articles of agreement into the name of the defendant John E. H. Spark or his assigns.

Harry Greenwood, for the plaintiff. The general rule undoubtedly is that the provisions of a separation deed are avoided by subsequent reconciliation and resumption of cohabitation: *Nicol* v. *Nicol* (1); *Bindley* v. *Mulloney* (2); *Marquess of Westmeath* v. *Marquess of Salisbury* (3); and the only question, therefore, is whether the settlement upon the children is so far outside the scope of a separation deed that it ought to be treated as a separate transaction, which is not affected by the reconciliation. It ought, however, to be observed that in *Bindley* v. *Mulloney* (2) the deed was in terms substantially similar to those of this deed.

(1) (1886) 31 Ch. D. 524.
(2) (1869) L. R. 7 Eq. 343.
(3) (1831) 5 Bli. (N.S.) 339; 35 R. R. 54.

Mossop, for the wife and children. On behalf of the children of the marriage who were born at the date of the separation deed, it is submitted that the deed, so far as it operated as a settlement, was not affected by the reconciliation, and remains in force. *Bindley* v. *Mulloney* (1) is distinguishable, because there the separation never took place, and the settlement on the children, being made in contemplation of a future separation, and of an event which never happened, was ineffectual. *Ruffles* v. *Alston* (2) is directly in point. There the separation deed contained a settlement of a chose in action, namely, a debt due from the husband's brother, on the husband and wife and the children of the marriage, and it was held by Malins V.-C. that as the deed contained provisions which were beyond the purview of a separation deed it could be supported as a valid settlement. No case can be cited in which a provision for children in a separation deed has been held to be revocable by the subsequent acts of the parents. Such a provision is in truth entirely outside the scope of a separation deed, and no such provision is to be found in the precedents of separation deeds in the recognised books, such as Davidson, Bythewood, and Key and Elphinstone. In *Webster* v. *Webster* (3) the Court upheld a parol agreement by the husband, in consideration of the wife returning to live with him, to charge on his real estate an annuity which by the separation deed was covenanted to be paid to her. [He referred also to *Hulme* v. *Chitty*. (4)]

Ward Coldridge, for the husband. It is submitted that, in accordance with the general rule, this separation deed was avoided by the reconciliation of the parties and resumption of cohabitation. With the single exception of *Ruffles* v. *Alston* (2), there is no case in the books where a deed expressed upon the face of it to be a deed of separation has been held to operate as a deed of a different character. In *Ruffles* v. *Alston* (2) the facts were peculiar: it was there the wife's property, and not the husband's, which was dealt with; the case was, therefore, wholly different from that of an ordinary separation deed,

(1) L. R. 7 Eq. 343.
(2) L. R. 19 Eq. 539, 545.
(3) (1853) 4 D. M. & G. 437.
(4) (1846) 9 Beav. 437.

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where the husband makes a provision for the maintenance of the children which is rendered necessary by the separation. *Bindley* v. *Mulloney* (1) is much more nearly in point. There the deed was on the face of it very much the same as the present deed, and the learned judge dealt with it as a separation deed pure and simple. In the case of the *Marquess of Westmeath* v. *Marquess of Salisbury* (2) the issue as to the separation was tried in the absence of the daughter of the marriage, and the House of Lords declined to decide anything affecting her interest; but the deed was treated as a separation deed, and the case, so far as it goes, is an authority in my favour. There is nothing in this instrument to take it out of the ordinary doctrine applicable to separation deeds.

KEKEWICH J. The point in this case depends really on the construction of the deed of February 25, 1893. I look at it for the moment apart from the motive, which no doubt was separation between husband and wife. There is an assignment by the husband to a trustee of all his share and interest under the will of his grandmother upon trust to pay the annual interest and proceeds thereof to the wife for life, and from and after her decease to divide the same between the existing children of the marriage who should attain twenty-one, or, being daughters, marry under that age. That is a perfectly good voluntary settlement within all the authorities, of which *Kekewich* v. *Manning* (3) is one; so that there is a perfect trust, declared and binding upon the husband, of his share under his grandmother's will, vesting that in the trustee, and giving him a right to sue for the share, to give a receipt for it, and to hold the money received on the trusts. A perfect voluntary settlement of that kind can never be revoked, and can only be carried out by the performance of the trust and the handing over of the property to the trustee. But it is said that that is not the proper view, because the agreement was made in anticipation and consideration of the separation. It recites the misconduct of the husband, and

(1) L. R. 7 Eq. 343. (2) 5 Bli. (N.S.) 339; 35 R. R. 54.
(3) (1851) 1 D. M. & G. 176.

the intention to live apart, and this very provision which is made for the wife and children is treated as the consideration of the covenant by the wife to provide for these children, and, therefore, if I can treat this merely as a provision for the wife and children during the separation, then, the parties being reconciled, the agreement is at an end. The agreement may be regarded from two points of view. In one sense, no doubt, separation is the paramount cause of it, that without which it would not have come into existence. On the other hand, though brought into existence by that cause, it does contain the assignment of property in trust in the way I have mentioned. Under these circumstances, the question is whether I ought to hold that the trustee would be safe in departing from his trust, and giving up this property to the husband and wife. The case in the House of Lords, though it touches this point, does not decide it. The House of Lords carefully guarded the rights of persons who were not parties. They did not decide the question, but held that the deed was void on other grounds. The case of *Bindley* v. *Mulloney* (1), before Lord Romilly, seems to me entirely different from this on the ground of decision. There the separation deed was in substance very like that which I have before me. It was a separation deed with a provision for children, and there is no doubt that might have been upheld as a settlement in the Court of Chancery. The Master of the Rolls said this: "The consideration has failed, and I must declare that the deed never took effect, and direct it to be cancelled." I may assume that he was perfectly right on the evidence before him, namely, that the separation had not taken place. Here the separation has taken place, and the consideration has taken effect. If it had been so in that case, the Master of the Rolls might have come to a different conclusion. But the precise point was before Malins V.-C. in *Ruffles* v. *Alston*. (2) There was there an equally good settlement, in the form of a covenant to hold on trust, coming as much within the principle of *Kekewich* v. *Manning* (3) as the settlement in the present case. Malins V.-C. declined to

(1) L. R. 7 Eq. 343, 347. (2) L. R. 19 Eq. 539.
(3) 1 D. M. & G. 176.

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regard it as a mere separation deed. He said that, taking the whole of the deed in question together, he was of opinion that it went beyond a mere separation deed, and that he thought it had also the effect of turning the legal debt of the brother into a trust enforceable in this Court. That case seems to me to apply here. There is a good voluntary settlement, and not the less so because it was made on the occasion of the separation, and the separation was the cause and motive of it. That being so, I do not see that the reconciliation affected the voluntary settlement, which accordingly must stand.

Solicitors: *Mossop & Rolfe; J. Campion.*

C. C. M. D.

KEKEWICH J. 1904 *Jan.* 29; *Feb.* 9.

In re SHEPHARD. GEORGE *v.* THYER.

[1903 S. 2424.]

Husband and Wife—Marriage—Evidence—Presumption from Cohabitation.

An English man and woman travelled to France with the intention of getting married, and there purported to go through a form of marriage; and they had since lived together in England as man and wife for thirty years and had several children. There was some evidence of recognition of the children by the family. It was assumed by the Court that a marriage such as was alleged was impossible according to French law and the habits of law-abiding people in France:—

Held, that this fact was not sufficient to rebut the presumption in favour of marriage arising from the long-continued cohabitation of the parties as man and wife.

The principle of *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, (1881) 6 App. Cas. 364, applied.

MRS. ANN PRISCILLA SHEPHARD, by her will dated December 13, 1897, gave two-thirds of her residuary estate between such of the children of George Allen as should be living at her decease in equal shares, and she died on July 7, 1902. At the time of her death George Allen had living five children by his first wife and six children by a lady whom he alleged to be his second wife. This summons was taken out by the executor of Mrs. Shephard's will to determine in effect whether the

children of the second family were entitled to participate with the children of the first family in the residuary bequest, or, in other words, whether they were the lawful children of George Allen. The birth certificates of all these children were produced, and in each of them George Allen was registered as the father and "Elizabeth Allen, formerly Williams," as the mother. In support of the claim of the second family a joint affidavit was filed by George and Elizabeth Allen, and both of them were cross-examined on this affidavit. The effect of their evidence was as follows. In 1873 George Allen, being then a widower with seven children, was desirous of marrying Elizabeth Williams, who was then aged twenty-one years, but wished to keep the marriage secret until after it had taken place. Accordingly in that year they journeyed from Falmouth to a French port in the steamship *Esther*, of which John Williams, a brother of Elizabeth, was the captain. Williams had not been heard of for many years, and could not now be found. On their arrival in France they travelled some little distance by train, and were then married. Neither of them could recollect the name of the town where they landed or the name of the town where the marriage took place, and neither of them knew the French language. The details of the marriage were arranged by a lady who was engaged to be married to Williams, and who was then living in France as a governess, and she took them to the place where they were married and witnessed the ceremony. She died many years ago. Besides this lady, there were two or three gentlemen present at the ceremony. The marriage probably took place at a registry office, as there was no clergyman officiating. The ceremony was performed in French. Mrs. Allen stated that so far as she recollected she did not sign any document, but she put on a ring. Some document which purported to be a marriage certificate was given to her husband, but neither of them read it. There were reasons why the marriage should not take place in England. Her relatives objected to Allen as her husband, and there had been an intimacy between Allen and her before the marriage. They returned to Plymouth in the same ship shortly after the marriage. They did not begin to live together until

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three weeks after their return, but since that time they had always lived together as man and wife and had had nine children, of whom six were living. At the date of the marriage Allen was a police constable stationed at Devoran, Cornwall. In accordance with the rules of the force he reported his marriage to the superintendent of the police, and an entry of the marriage was made in the police register kept for that purpose; but by mistake the marriage was entered as having taken place at Devoran. He had once been in possession of the marriage certificate, but had since lost it.

The inability of both Mr. and Mrs. Allen to remember the name of the town in which they were married was accounted for as follows: Allen deposed that some years ago he met with an accident which resulted in a great loss of memory. While working on the Great Western Railway he fell off a viaduct and cut his head and broke his arm. Mrs. Allen stated that she was too excited with the change of scenery, people, and manners, and with the event of her marriage, to take any particular count of the names of the towns to which they went.

In addition to this evidence there was evidence that Mrs. Shephard, who was Allen's sister, except that they were both born out of wedlock, was on intimate terms with the children of the second family, and that she treated them as his lawful children and described herself as their aunt, and at her request one of the children was sent to live with her.

The members of the first family disputed the right of the children of the second family to participate under her will, and they now for the first time denied that their father was ever married to his second wife.

J. M. Gover, for the summons.

Jessel, for the children of the second marriage. In this case there has been a union of thirty years, and there has never been any suggestion until the present litigation that the parties were not married. The only argument against the marriage is that this is an improbable story; but it must be borne in mind that these are people in a humble position. The cases shew that there is an almost irrebuttable presumption in favour

of the marriage under these circumstances. If these people were dead, there could be no question as to the sufficiency of the evidence of marriage; but, even though they are alive, there must be strong if not conclusive evidence to rebut the presumption arising from cohabitation for thirty years as man and wife: *The Breadalbane Case* (1); *Lyle* v. *Ellwood* (2); *Hervey* v. *Hervey* (3); *Piers* v. *Piers* (4); *Rex* v. *Inhabitants of Stockland.* (5) In *St. Devereux* v. *Much Dew Church* (6) a distinction was drawn between evidence of the marriage and evidence of the publication of the banns; but *Hervey* v. *Hervey* (3) shews that there is no foundation for the distinction. In *Hervey* v. *Hervey* (3) and *Rex* v. *Inhabitants of Stockland* (5) the marriage was upheld, though it was disputed by the husband himself.

[At the conclusion of this argument an application was made on behalf of the children of the first family for leave to cross-examine George and Elizabeth Allen on their joint affidavit, notwithstanding that no notice to cross-examine had been given within the prescribed time. The Court granted the application, and directed the case to stand over till February 9 for that purpose. Mr. and Mrs. Allen were then cross-examined with the result above stated.]

E. Beaumont, for four of the children by the first marriage, proposed to call a French expert as a witness to prove that such a marriage as was alleged was impossible according to the law of France; but this was objected to.

[KEKEWICH J. suggested that the case should be argued on the assumption that such a marriage as was alleged was impossible according to French law and the habits of law-abiding people in France, and the argument proceeded on that basis.]

The decided cases in which the existence of a valid marriage has been presumed from habit and repute have been mainly cases of marriages in Scotland, by the law of which country

(1) (1867) L. R. 1 H. L., Sc. 182, 199.
(2) (1874) L. R. 19 Eq. 98.
(3) (1773) 2 W. Bl. 877.
(4) (1849) 2 H. L. C. 331, 361–3.
(5) (1762) Burr. S. C. 508.
(6) (1762) 1 W. Bl. 367.

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irregular marriages are allowed; or cases in early times, when the proof of marriage was often attended with difficulty. In *Hervey* v. *Hervey* (1) the supposed marriage was in the Fleet before 26 Geo. 2, c. 33. Clandestine marriages are impossible in France, and therefore much more cogent evidence is required as the ground for presumption of a marriage in that country than in Scotland or in England in former times before the system of registration of marriages was perfected.

[KEKEWICH J. referred to *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie.* (2)]

Those who deny the validity of the marriage cannot be called upon to prove a negative. It is sufficient to point out that the story told by the parties to the alleged marriage is absurd and incredible. This case is not one of a mere presumption, as in *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie.* (2) The Court is not here in the difficulty of knowing nothing about the facts, because the foundation of the case is that a marriage took place at a particular time and under particular circumstances in France, and that such a marriage should have taken place as so alleged is found to be impossible. (3)

E. Ford, for the remaining child of the first marriage, adopted the foregoing argument.

KEKEWICH J. No one who has listened to this case would require to be told that it is a case of difficulty and peculiarity. Having heard what I have to-day, I am prepared to give judgment without hesitation. I was not before; and it is the examination which has been taken for the assistance of the Court, and not merely, as has been suggested, by way of indulgence to Mr. Beaumont, which enables me to dispose of the case. The story is, no doubt, a very strange one. George Allen was in 1873 a widower with seven children. That he desired to marry Elizabeth Williams and that Elizabeth Williams desired to be married to him is beyond doubt. They

(1) 2 W. Bl. 877.

(2) 6 App. Cas. 364.

(3) [It would seem that, according to the statement of the parties, the requirements as to notice, residence and otherwise which are set forth in the Code Civil, tit. 2, ch. 3, "Des Actes de Mariages," could not have been satisfied.—F. P.]

had been living together, and there had been an intimacy between them which made an early marriage extremely desirable. He was in the police force, and he knew that he should have to report his marriage to the chief constable. Apparently he did not intend to avoid that; nor did he intend to conceal his marriage, but he did not wish that any one should know of it until after it had taken place. That is the weak part of his story. If he really intended to live with his wife, why he did not go to the parish church, instead of to France, to be married he did not know how or where, is not easy to be understood. Nor is it easy as regards the wife, except that she wished to be married, and that being the desire on her part she would reasonably wish to please her intended husband, and I can more easily conceive her consenting to go to France to be married than I can understand his desiring to go there. She had relations who were "not agreeable." I understand that to mean they knew that she was on friendly terms with George Allen—whether they knew more does not appear—and did not care for him as one of the family. She was content that the marriage should take place where he pleased, but not be disclosed until an accomplished fact. That was the state in which they were before they started. Elizabeth Williams had a brother, who was captain of a merchant steamer. This man, known as Johnny Williams, was engaged to a lady in France who was a governess, and either Johnny Williams or this lady suggested the marriage in France. I cannot, on the cross-examination of Mr. and Mrs. Allen, who were cross-examined with proper severity, doubt that it was arranged that the two should go in Johnny Williams' ship to France, and that they left Falmouth and came back to Plymouth, and were not absent long. What they did in France is very difficult to ascertain. I think I must take it that they went somewhere in accordance with an arrangement made by the intended sister-in-law. They went somewhere where they purported to go through something like a ceremony of marriage. There was a ring put on by the lady herself, some kind of ceremony, and something by way of acknowledgment that a marriage had

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taken place. Then both agree that something like a certificate was given. What it was it is difficult to say, and I think it better to leave it out of the question. It was not likely to be in English; neither of them could really tell me what it was like. Then there is a long story about producing it to the chief constable. Somehow or other the certificate is not forthcoming. They came home and, after a short interval, they lived together as husband and wife. There seems to have been some reason for not doing so during the first two or three weeks. They have lived together as husband and wife up to the present time, that is, for thirty years, and she has borne several children, and it is their claim which I am considering. There is some evidence on the affidavits and some evidence in the witness-box to-day of recognition by the family. The question is whether under these circumstances I ought to require strict proof of the marriage in order to admit the children to share in the property which has been given to the children of George Allen. Mr. Beaumont wished to call the evidence of a French expert to prove the impossibility of this marriage. To avoid controversy I have asked him to assume that this marriage as alleged was impossible according to French law, and according to the habits of law-abiding people in France. Beyond that the evidence of an expert could not possibly go. No one can say that persons might not have met together in a room, and purported to marry them, and go through certain ceremonies, and even give to them something which purported to be a certificate. But I will assume that it was impossible according to the law of France and the habits of law-abiding people in France that there should have been a marriage as alleged. Now what is the proper conclusion to be arrived at? There are many cases in which the fact of marriage has been made a great deal of. If we start from the fact of marriage, then the presumption is exceedingly strong. There are other cases which go very much on the recognition of the children and wife, or more often of the children, and point to that as substantiating the marriage—that is to say, as strengthening the presumption in favour of the marriage. But Mr. Beaumont argues in the first place that the old law has been largely abrogated by the greater proof

obtainable nowadays since the registration of marriages; and, secondly, he says that to a great extent the cases depend on the law of Scotland, where even at the present day there are facilities for irregular marriages. But, as I pointed out, the case in the Privy Council of *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1), decided in 1881, negatives both those arguments. Here we have a case decided in quite modern times, long after all the legislation in favour of publicity and registration. It was a case of a marriage in Ceylon, and no doubt in the judgment we find a most interesting description of the law of Ceylon and of the people called the Tamils, but what was said by Sir Barnes Peacock was this: "It appears from the authorities which he" (Dr. Phillimore) "cited that, according to Roman-Dutch law, there was a presumption in favour of marriage rather than that of concubinage. It does not, therefore, appear to their Lordships that the law of Ceylon is different from that which prevails in this country; namely, that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage"; and later on he refers to *Piers* v. *Piers* (2), and incidentally to *Morris* v. *Davies*. (3) So that I have here a case of the highest authority getting rid of the fact of marriage, and recognition of children: it does not shew that either of these is essential; but the parties were living together as man and wife for the time mentioned in the report, and it was held that the presumption of marriage must prevail. Now here I have the intention to marry: about that there is not a shadow of doubt. I have some evidence about which there is a great deal of doubt. There is a somewhat romantic story, doubtful in its details, of a marriage de facto, of something gone through to perfect the intention of marriage, and I have some evidence of recognition of children. Now, after thirty years, the Court has been asked to say that because the marriage has not been proved, and cannot be proved, these children are not to be admitted to

(1) 6 App. Cas. 364, 371. (2) 2 H. L. C. 331.
(3) (1837) 5 Cl. & F. 163; 47 R. R. 50.

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share. I think I should be going against the authorities if I came to any such conclusion, and therefore I must hold that they are entitled to share.

Solicitors: *Mead & Co., for S. G. C. Cossham, Bristol; Busk, Mellor & Norris, for Cleverton & Son, Plymouth; Gribble, Oddie, Sinclair & Johnson, for Eastley & Eastley, Paignton.*

H. B. H.

KEKEWICH J. 1904 *Feb.* 17.

PLEWS *v.* SAMUEL.

[1903 P. 989.]

Vendor and Purchaser—Vendor in Possession and receiving Rents after Date for Completion—Arrears of Rent previously Due.

Where completion of a purchase is delayed, without any fault on the part of the purchaser, and the vendor remains in possession and receives rents after the date fixed by the contract for completion, the vendor is not at liberty, as against the purchaser, to retain out of the rents so received arrears of rent accrued due at the date of the contract, or subsequently before the date fixed for completion.

THIS was an action by vendors for specific performance, in which the only question was as to the right of the vendors, who had remained in possession after the day fixed for completion, to make a certain deduction from the amount of rents received by them.

From admissions entered into between the parties the following facts appeared:—

By an agreement dated February 24, 1902, the plaintiffs agreed to sell and the defendant agreed to purchase certain leasehold properties, being Nos. 172, 173, and 174, Bute Street, Cardiff, subject to the conditions of sale therein referred to so far as the same applied to a sale by private contract.

The premises Nos. 172 and 174, Bute Street were stated to be then let at the respective rents of 1*l.* 2*s.* 6*d.* per week and 1*l.* 7*s.* 6*d.* per week, the landlords paying all outgoings.

The conditions of sale provided amongst other things that the purchase should be completed on March 18, 1902, and that if the purchaser should not complete the purchase at the

time appointed, and the sale should not be annulled, he should pay interest on the unpaid purchase-money after the rate of 6*l.* per centum per annum from that day until the same should be paid, or the vendor might at his option take the rents of the property for the same period.

Shortly after the date of the agreement the defendant contended that he was entitled to a conveyance of certain other premises, and the plaintiffs in consequence issued a summons under the Vendor and Purchaser Act, 1874, and in the result it was decided that the defendant's contention was not sustainable. Pending the decision of the summons, the defendant did not complete the purchase on March 18, 1902, but the plaintiffs remained in possession of the premises comprised in the agreement.

At the date of the agreement sums amounting to 31*l.* 1*s.* and at the date fixed for completion sums amounting to 34*l.* were owing by tenants of the premises for arrears of rent. The defendant did not know this till long after, but he did not make any inquiries of the plaintiffs on the subject.

The defendant had accepted the plaintiffs' title; and the plaintiffs had elected to receive interest on the unpaid purchase-money.

On March 9, 1903, when completion was about to take place, the plaintiffs rendered an apportionment account made out on the footing that they were entitled as against the defendant to apply out of the sums received from the tenants the sum of 34*l.* in payment of the arrears. The defendant refused to acknowledge the claim, and tendered the full amount of the purchase-money on the footing that the plaintiffs were not entitled so to apply the sum of 34*l.* or any part thereof.

On May 1, 1903, this action was brought. The defendant by his defence pleaded that his liability to pay the 34*l.* was the only question in dispute, and that he had tendered all other moneys and brought all such other moneys into court accordingly.

On August 10, 1903, the plaintiffs for the first time informed the defendant that 2*l.* 19*s.* of the 34*l.* aforesaid accrued due between February 24 and March 18, 1902.

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The question stated for the decision of the Court was whether the plaintiffs were entitled to retain out of the moneys received for rent the sum of 34*l.*, or alternatively the sum of 34*l.* less the sum of 2*l.* 19*s.*

MacSwinney, for the plaintiffs. The vendors are clearly entitled as between them and the tenants to appropriate moneys received for rent to the payment of arrears due; the only question is whether they have the same right as against the purchaser, and it is submitted that they have. No doubt a vendor in possession is in a fiduciary position as regards the purchaser; it is his duty to take reasonable care of the property: Fry on Specific Performance, 4th ed. pp. 590 et seq.; and he may be held liable for deterioration, as in *Foster* v. *Deacon* (1); or for allowing the property to lie waste, as in *Phillips* v. *Silvester* (2); but he is only a trustee sub modo, and not in the ordinary sense of the word: *Lysaght* v. *Edwards* (3); and the analogy between him and an actual trustee is a very imperfect one: see the observations of Knight Bruce L.J. in *Sherwin* v. *Shakspear*. (4) A vendor cannot be made liable for wilful default unless specific acts of wilful default are alleged in the pleadings and proved at the hearing, and no such case has been made here. There is no evidence that any rents were paid to the vendors in respect of current liabilities only, or otherwise than generally. In any view the question of wilful default could not apply to so much of the 34*l.* as represented rent due previously to the date of the contract, but only to the 2*l.* 19*s.* attributable to the period between the contract and the time for completion.

P. O. Lawrence, K.C., and *Ashton Cross*, for the defendant. The fiduciary position and consequent liability of a vendor is not limited in the manner suggested. We rely on the judgment of Lord Selborne in *Phillips* v. *Silvester* (5), and of your Lordship in *Royal Bristol Permanent Building Society* v. *Bomash* (6), as shewing that the vendors in this case are for

(1) (1818) 3 Madd. 394; 18 R. R. 251.
(2) (1872) L. R. 8 Ch. 173.
(3) (1876) 2 Ch. D. 499.
(4) (1854) 5 D. M. & G. 517, 531.
(5) L. R. 8 Ch. 177.
(6) (1887) 35 Ch. D. 390, 397.

all practical purposes in the position of trustees for the purchaser, and they cannot discharge themselves as trustees without bringing into account all rents received by them during the period of their trusteeship. The vendors never informed the purchaser that there were any rents in arrear, and, leaving him uninformed, they exercised their option of receiving 6 per cent. interest on the purchase-money after the date fixed for completion. They now seek to take up the position of trustees farming the estate for the purpose of getting in the arrears due to themselves without regard to the interest of their beneficiaries. Before the date fixed for completion the vendors were entitled to all the rents and profits, and had to discharge the outgoings, but after that date the position was, by their own act, wholly changed, and they were no longer entitled to rents and profits, but were trustees of all that they received.

MacSwinney, in reply. It is not denied that a vendor remaining in possession is in the position of a trustee, but in all the cases, including those relied on for the defendant, it is pointed out that he is only a trustee in a modified sense. The limit of his duty is that he should exercise reasonable care to keep the property in a proper condition: Dart's Vendors and Purchasers, 6th ed. pp. 283, 284. It is not the duty of a vendor to tell the purchaser that there are arrears of rent due to the vendor.

KEKEWICH J. This is a nice point and certainly not covered by authority. There are many cases as to the relation of vendor and purchaser where land is contracted to be sold and the vendor remains in possession after the date of the contract. One of the most instructive cases on the subject is *Lysaght* v. *Edwards* (1), before Sir George Jessel, in which he examines the authorities and lays down a rule of his own. In that case the question raised was whether land contracted to be sold, that is to say, included in a contract which was capable of specific performance, passed under a devise of real estate vested in the testator as trustee, and that raised the question whether the vendor could be called a trustee after the date of

(1) 2 Ch. D. 499.

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the contract. Sir George Jessel decided that the vendor was a trustee in such a sense that a devise of trust estates passed the estate, and the learned judge, after referring to the liability of the purchaser (1), said this: "In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase-money and his right to enforce his security against the estate." The relation of the vendor to the purchaser is further illustrated by the case of *Phillips* v. *Silvester* (2), shewing that a vendor may be made liable, as he was in that case, for neglect to take care of the property; and there are cases, shewing that he may be charged with wilful default, which follow the doctrine laid down in *Phillips* v. *Silvester*. (2) But all those cases dealt with the contract. There was no suggestion in any of them of anything more than the relation constituted between vendor and purchaser by a contract which was capable of specific performance, and everything that is laid down is subject to the contract being eventually performed, because if the contract is not performed, notwithstanding that the vendor for many months, or it may be years, is a trustee for the purchaser, the relation is altogether discharged, and nothing can be said against the vendor as to neglect or even misfeasance. If, for instance, a vendor obtained a judgment for specific performance which was afterwards set aside on appeal, he remaining all the time in possession, all that could be said against him in the interval would fall to the ground, and he would remain in possession free from any liability. That is an illustration of his curious position. He is a trustee in a modified sense. I have now to consider his position not while he remains in possession on his own behalf, but from the time after which the purchaser becomes entitled to the rents and profits; that is usually, according to the common form, the day fixed for completion. Here it was March 18, 1902, and from that day the purchaser was entitled to possession and liable to pay interest on unpaid

(1) 2 Ch. D. 507. (2) L. R. 8 Ch. 173.

purchase-money. The vendors still remained in possession through no fault of theirs, and through no fault, in a legal sense, of the purchaser. He raised a question which he was entitled to raise, and pending the decision of which he could not take possession. After March 18, 1902, the whole of the rents and profits belonged to the purchaser, the vendors being rightly in possession. They received the rents. There were rents in arrear at the date of the contract and also at the time fixed for completion, and the vendors say they are entitled to appropriate the rents received by them to the rents so in arrear, and that is a question involving a difference in the accounts of 34*l.*: not a very large sum, but raising a very important question. If there had been nothing else in it, I should have thought the vendors were entitled to say that, the tenants not having appropriated the payments made by them, they were entitled to appropriate them to any debt due to themselves, and therefore to the rent due before March 18, 1902. But they are trustees in some sense, modified, not full, but still trustees; they are in a fiduciary position to the purchaser, and owe a duty to him. That duty is to receive the rents and hold them for the purchaser. They have also an interest as being possibly entitled to the rents if the purchaser does not complete, and in any event entitled to the rents due before March 18. It is clearly to their interest to say that the rents in question were paid to them for the period before March 18. It is equally clear that their duty is the other way. It comes to this, that there is a conflict between interest and duty. When there is such a conflict, in the case of a person occupying the position of a trustee, duty must prevail, and if duty has not prevailed in fact, the Court will insist on the duty being performed. I think that here, the matter being entirely open, I am bound to say that, duty prevailing, the vendors really received the rents for the purchaser to whom they belong, and cannot set up their own interest.

Solicitors: *Bower, Cotton & Bower, for Stephens, David & Co., Cardiff; Windybank, Samuell & Lawrence, for Lewis Morgan & Box, Cardiff.*

C. C. M. D.

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Feb. 3, 4, 13, 25.

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[1902 H. 3535.]

Husband and Wife—Post-nuptial Settlement—Trust for Wife during Cohabitation—Validity—Policy of the Law.

By a post-nuptial settlement the husband assigned certain leaseholds to trustees upon trust to pay the rents to his wife for life, or so long as she should continue the cohabiting wife or the widow of the settlor, for her separate use, and upon the determination of the trust in favour of the wife the husband took an interest in the settled property. Some years after the date of the settlement the husband and wife separated by mutual consent, and they had not since cohabited :—

Held, that the restriction of the wife's enjoyment of the rents to the period of cohabitation was not void as against the policy of the law, and that the trust in her favour determined upon her ceasing to live with her husband.

Cartwright v. *Cartwright*, (1853) 3 D. M. & G. 982, and *H.* v. *W.*, (1857) 3 K. & J. 382, distinguished.

By a post-nuptial settlement dated April 11, 1877, W. J. Hope Johnstone assigned certain leaseholds, subject to a mortgage thereon, to trustees upon trust to pay the annual proceeds thereof to his wife for life, "or so long as she shall continue the cohabiting wife or the widow" of the settlor, for her separate use without power of anticipation, "and from and after the dissolution of their marriage or judicial separation between them" upon trust to pay the annual proceeds to the settlor until his decease or bankruptcy, with divers trusts over.

By a post-nuptial settlement dated December 1, 1880, certain other leaseholds, subject to certain mortgages thereon, were assigned to the same trustees upon similar trusts. In the events which happened, the only property now subject to the trusts of these settlements was a portion of the leasehold premises comprised in the settlement of December 1, 1880.

In 1889 the husband and wife separated by mutual consent, and they had not since cohabited.

This was a summons taken out by the trustees against the

husband, the wife, and the children of the marriage to have it decided (among other questions) whether the trust in favour of the wife determined upon the husband and wife ceasing to live together.

This question, upon which alone the case is reported, was twice argued.

MacSwinney, for the trustees.

Martelli, for the wife. This is a case of alternative limitations in favour of the wife. The second alternative is void as against public policy, in that it contemplates the future separation of the husband and wife. The result is that the first alternative remains, and the wife is still entitled to the income of the settled property. The settlement must be read as though the words "so long as she shall continue the cohabiting wife" were struck out. In substance, though not in form, this is a gift to the wife if she shall cohabit. At first sight that would seem to be a meritorious provision; but it is open to objection because it offers an inducement to the husband, who takes an interest in the property either by way of resulting trust or under the gift over upon her ceasing to cohabit, to provoke a separation. Any disposition which contemplates a state of future separation during the existence of the coverture is looked upon by the Courts as contra bonos mores, and is wholly void: *Marquess of Westmeath* v. *Marquess of Salisbury* (1); *Cartwright* v. *Cartwright* (2); *H.* v. *W.* (3); *In re Moore* (4); *Duchess of Marlborough* v. *Duke of Marlborough*. (5) This principle applies whatever the nature of the instrument by which the disposition is made—whether it is a settlement or a will: *Brown* v. *Peck* (6); *Wren* v. *Bradley* (7); *In re Moore* (4); and if a settlement, whether ante-nuptial or post-nuptial, and whether the person making the disposition is the husband or a third party: *Cartwright* v. *Cartwright*. (8) This case is indistinguishable from *Cartwright* v. *Cartwright* (2) and *H.* v.

(1) (1830) 5 Bli. (N.S.) 339; 1 Dow & Cl. 519; 35 R. R. 54.
(2) 3 D. M. & G. 982.
(3) 3 K. & J. 382.
(4) (1888) 39 Ch. D. 116.
(5) [1901] 1 Ch. 165, 171.
(6) (1758) 1 Eden, 140.
(7) (1848) 2 De G. & Sm. 49.
(8) 3 D. M. & G. 990, 992.

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W. (1) It may be said that a man may deal as he chooses with his own property; but this is only true subject to limitations, and in whatever form the disposition is it is wholly void if it is against public policy: *Egerton* v. *Earl Brownlow.* (2) There is no analogy between a disposition which is contrary to public policy and a disposition which offends against the bankruptcy laws; for, in the first place, the latter disposition is bad only as against the trustee in bankruptcy; and, secondly, there is nothing illegal in the donor contemplating the bankruptcy of his donee. He may qualify the interest of his donee by a condition to take effect on bankruptcy although he cannot qualify his own interest by a like condition to the disappointment or delay of his creditors: *Wilson* v. *Greenwood* (3); *Higinbotham* v. *Holme* (4); *Ex parte Barter.* (5) An argument based upon the supposed analogy of the two cases was used in *Cartwright* v. *Cartwright* (6), but was disposed of by Turner L.J. Further, as a matter of construction, I say that, having regard to the terms of the gift over, the wife remains a cohabiting wife within the meaning of the term as used in this clause until there has been either a dissolution of the marriage or a judicial separation, and on that ground also she is still entitled to the income.

Nutter, for the husband. 1. The Court will now regard a disposition of this kind differently from the way in which it was regarded fifty years ago, when *Cartwright* v. *Cartwright* (6) and *H.* v. *W.* (1) were decided: see *Bishop* v. *Bishop* (7), per Lindley L.J., and *Hunt* v. *Hunt.* (8) In those days the Divorce Acts had not been passed, and it may be reasonably inferred that the facilities thereby afforded for obtaining a divorce or a judicial separation must have had some effect upon the attitude of the Court towards provisions of this kind.

2. This deed does not offend against public policy. The inducement is to make the parties live together, and not to live apart. As was said by Vaughan Williams L.J. in *Duchess*

(1) 3 K. & J. 382.
(2) (1853) 4 H. L. C. 1, 196, 241–2.
(3) (1818) 1 Swans. 471, 481, n.; 18 R. R. 118.
(4) (1812) 19 Ves. 88; 12 R. R. 146.
(5) (1884) 26 Ch. D. 510, 519–20.
(6) 3 D. M. & G. 982.
(7) [1897] P. 138, 164.
(8) (1862) 4 D. F. & J. 221; L. R. 1 H. L., Sc. 65, n.

of Marlborough v. *Duke of Marlborough* (1), "public policy must depend on a balance of what is politic or right," and to determine that the whole settlement must be looked at. Regarded as a whole, the settlement does not offend against public policy at all. Its primary object is to induce the wife to discharge her duties faithfully.

3. This is a deed of gift, and not a settlement. In stating the result of the authorities, Rigby L.J., in *Duchess of Marlborough* v. *Duke of Marlborough* (2), speaks of the parties to a marriage settlement bargaining about an event which the law does not allow them to anticipate. Here there is nothing in the nature of a bargain. The cases on wills, namely, *Brown* v. *Peck* (3), *Wren* v. *Bradley* (4), and *In re Moore* (5), are distinguishable, because in each of those cases the inducement on the wife was to live apart from her husband.

4. This is not a condition, but a limitation. It is a limitation the duration of which is defined by something which is purely within public policy.

The decision of Wood V.-C. in *H.* v. *W.* (6) must be taken subject to the observations of Lord Westbury in *Hunt* v. *Hunt*. (7) It is impossible now to say that a voluntary separation is contrary to the policy of the law. *Cartwright* v. *Cartwright* (8) is distinguishable because there the settlement was ante-nuptial, not post-nuptial; the question arose as to a condition, not a limitation, and the decision turned upon the misconduct of the husband.

Owen Thompson, for the children of the marriage.

Martelli, in reply. There is no foundation for the suggestion that the Divorce Acts have in any way altered the view of the Courts as to agreements for future separation. It is not contrary to the policy of the law for the parties to bargain for an immediate separation, and that is the distinction between *Hunt* v. *Hunt* (9) and the present case.

Cur. adv. vult.

(1) [1901] 1 Ch. 172.
(2) Ibid. 171.
(3) 1 Eden, 140.
(4) 2 De G. & Sm. 49.
(5) 39 Ch. D. 116.
(6) 3 K. & J. 382.
(7) 4 D. F. & J. 226–8.
(8) 3 D. M. & G. 982.
(9) 4 D. F. & J. 221; L. R. 1 H. L., Sc. 65, n.

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Feb. 25. KEKEWICH J. By the deed which it falls to me to interpret, the settlor secured to his wife by the intervention of trustees an annuity in the shape of the rents and profits of the property comprised in the deed, which was directed to be paid during the natural life of the said Emily M. Hope Johnstone, "or so long as she shall continue the cohabiting wife or the widow of the said William J. Hope Johnstone." The meaning of this is perfectly clear. There is no occasion for the moment to look beyond the joint lives, but during the joint lives the lady is to receive the rents and profits if and so long as she continues to cohabit with her husband. It is a conditional gift in that a condition is attached to it, but it is a limitation and not a gift defeasible on the performance or non-performance of a condition precedent or subsequent. The lady is no longer cohabiting with her husband, and she insists that she is nevertheless entitled to receive the rents and profits because her enjoyment of them is fettered in a manner which the law will not sanction. The phrase most frequently used in argument was "public policy," but, following the example of many eminent judges, I prefer "the policy of the law." The question is whether the fetter or restriction thus placed on the lady's enjoyment is so antagonistic to the public good that the Court is bound to refuse its sanction to it. What the Court is or is not bound to do must depend on authority. There may be, and, indeed, there certainly are, from time to time modifications of the view taken by the Courts respecting restrictions on liberty of gift or contract; but generally speaking it is the duty of a judge considering a question of this kind to examine the authorities, and to determine whether the particular case submitted to him falls within them.

There are many authorities, ancient and modern, shewing that the Courts abhor provisions in instruments of whatever kind contemplating the interruption of conjugal relations, and hold such provisions void as against the policy of the law. It is sufficient for the moment to refer to the words of Wood V.-C. in *H.* v. *W.* (1), where he says: "It is forbidden to provide for the possible dissolution of the marriage contract, which the

(1) 3 K. & J. 382, 387.

policy of the law is to preserve intact and inviolate." There is no desire on my part to narrow this principle or to avoid the application of language used in connection with it to any case to which it may properly be extended. But it is well to look at some of the cases with the view of ascertaining what the principle was understood to be by the judges who decided them, and how they intended to apply it. *Marquess of Westmeath* v. *Marquess of Salisbury* (1) may be taken as the first of the series. There had been disputes between husband and wife, and an arrangement for continued cohabitation was made. That arrangement was expressed in a deed of 1817, which contained provisions contemplating the renewal of disputes and the cesser of cohabitation. After the execution of that deed the husband and wife continued to live together for a time, but in 1818 they agreed to separate, and another deed providing for their separation was executed. The circumstances under which those deeds were executed and the conduct of the parties were of the most peculiar character, and formed the main subject of elaborate discussion in the House of Lords. No useful purpose would be answered by following that discussion in detail. The case is abridged for the present purpose with sufficient accuracy in the Revised Reports (2), and the head-note there states correctly the conclusion arrived at: "A prospective separation deed to take effect in the event of a future separation of husband and wife is void." Lord Eldon took a prominent part in the discussion in the House of Lords, and more than once supported the principle on which this conclusion was founded. That is the principle the expression of which I have taken from Wood V.-C.'s language above quoted. In the case of *Cartwright* v. *Cartwright* (3), to be presently mentioned, Lord Eldon is said to have stated that conclusion in language quoted from *Earl of Westmeath* v. *Countess of Westmeath.* (4) I have been unable to find the passage there, but the quotation accords in substance with a passage in *Marquess of Westmeath* v.

(1) 5 Bli. (N.S.) 339; 1 Dow & Cl. 519; 35 R. R. 54.
(2) 35 R. R. 54.
(3) 3 D. M. & G. 982.
(4) (1821) Jac. 126.

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Marquess of Salisbury. (1) Another case declaring the principle and illustrating its application is *Cartwright* v. *Cartwright*. (2) There was an ante-nuptial settlement distinctly providing for the event of a separation by reason of any disagreement or otherwise between the intended husband and wife, and this first Wood V.-C., and then the Court of Appeal, held altogether void. The judgments are in part concerned with the question whether the provision was in the nature of a condition or was a limitation, and it was determined to be the former. Having determined that, Knight Bruce L.J. says: "I am of opinion that such a proviso is against public policy, and therefore void," and Turner L.J. expresses the same view. The next case deserving attention is one already referred to—*H.* v. *W.* (3) In his judgment the Vice-Chancellor referred to *Cartwright* v. *Cartwright* (4), which he was unable to distinguish from that before him; but the facts were different, and require careful observation with reference to the question now to be determined. Income of property vested in trustees was directed to be paid to the wife during the joint lives of herself and her husband, if she should so long continue to live with him and should not live separate and apart from him through any fault of her own; and this limitation was followed by a direction that in the event of the wife living separate and apart from her husband through any such fault as aforesaid, then from and immediately after such an event the trustees should permit the survivor in case of death, and the husband in the event of the wife so living separate and apart from him as aforesaid, to receive the income for the rest of his or her life. I am not sure whether the Vice-Chancellor treated this as a limitation or as a gift with a condition. On p. 384 he treats it as a gift with a condition attached, and on p. 387 he refers to *Egerton* v. *Earl Brownlow* (5) as a leading authority on questions relating to conditions, but further down on the same page he speaks of the gift as a limitation, which I venture to think was the proper view. But, however that may be, he expresses himself clearly and strongly

(1) 5 Bli. (N.S.) 339, 395; 1 Dow & Cl. 519, 542; 35 R. R. 54.
(2) 3 D. M. & G. 982, 989.
(3) 3 K. & J. 382.
(4) 3 D. M. & G. 982.
(5) 4 H. L. C. 1.

on the question of the policy of the law. Immediately after the passage on p. 387, which has already been quoted, he says this: "I cannot look on this limitation for the benefit of the husband in the event of the wife leaving him without cause, as otherwise than contrary to the policy of the law; because it would give to the husband a benefit by waiving his marital right, which, in the event of the wife leaving him capriciously, might induce him to consent to a continued separation, in order that he might enjoy this property instead of enforcing those rights which the law requires him to enforce, to preserve intact the marital contract." A later case deserving notice is *In re Moore*. (1) The subject of decision was a direction by will for payment of a weekly sum to a lady during such time as she should live apart from her husband. The real question was whether this was a gift of an annuity subject to a condition or a limited gift, and it was held by Kay J. and the Court of Appeal to be a limited gift, the commencement and duration of which were fixed in a way which the law does not allow. Consequently the entire gift failed. Cotton L.J. says (2): "The testator did not like the husband, and his apparent object was to induce the wife to live separate from him. If so, the gift was for a purpose which is contrary to the law of England, for that law does not allow provisions made in contemplation of a future separation between husband and wife." The only other case necessary to mention in this connection is *Duchess of Marlborough* v. *Duke of Marlborough*. (3) The Court had to consider whether a power of jointuring, which on the face of it might be exercised in favour of any number of wives in succession, was exercisable in favour of a second wife, who only filled that character by reason of the first wife having been divorced. Byrne J. and the Court of Appeal decided that it was exercisable, holding that the policy of the law did not interfere to prevent that conclusion. Dealing with the authorities which were relied on for a different conclusion, Rigby L.J. says this (4): "All these cases are alike in one respect. The parties to a marriage settlement, or what

(1) 39 Ch. D. 116.
(2) Ibid. 128.
(3) [1901] 1 Ch. 165.
(4) Ibid. 171.

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was equivalent to it, chose to bargain as to what should take place in the event of a future separation of the spouses. There can be no doubt that such a bargain is absolutely bad. All that was there held was that, if persons choose to bargain about an event which they are not entitled to anticipate, their bargain will be bad." The decision of Lord Westbury in *Hunt* v. *Hunt* (1), and other decisions upholding separation deeds as enforceable in equity, cannot properly be regarded as an infringement of the principle thus firmly established. Those decisions treat the separation of husband and wife as an event which cannot be styled illegal when it is an accomplished fact, and hold, reasonably enough, if I may be allowed to say so, that there is no objection to enforcing the terms according to which the separation took place. That is a very different thing from sanctioning provisions for a contemplated event which the law abhors. It is difficult to see how the provision now under consideration falls within these authorities or the judicial dicta which I have quoted. Here the gift is to the wife as long as she cohabits with her husband; and there is no contemplation of a future separation, except so far as the terms of the gift necessarily imply that if she lives apart from her husband she shall no longer enjoy the gift. That seems to be a provision rather in favour of morality than against it, rather to secure the continuance of cohabitation than to encourage a severance. It might possibly be argued, and Wood V.-C.'s language might be quoted in support of the argument, that the interest of the husband arising on the cesser of the annuity, when he would be entitled for life, might induce him so to treat his wife as to provoke a separation; but such an argument, to my mind, is altogether wanting in substance. Policy of the law ought not, I think, to be pressed into the service of highly improbable contingencies. In this I am supported by the opinions of many of the judges who advised the House of Lords in *Egerton* v. *Earl Brownlow*. (2) The House decided the particular case before them adversely to the opinions of the majority of the judges, but those opinions are nevertheless entitled to great weight in the consideration of the general

(1) 4 D. F. & J. 221. (2) 4 H. L. C. 1.

question what is against the policy of the law, and of the application of the principle to special facts. If that view be correct there is no reason either in principle or on authority for declining to give effect to this deed according to the plain construction of it, and, in my opinion, the gift must be held good. In saying that, I do not consider myself as in the slightest degree differing from Wood V.-C., who was dealing with the case before him from another point of view.

In the preceding remarks I have dealt with the only question fully argued, to which, by reason of its importance, apart from the particular case, I have thought it right to devote much attention. But as at present advised, and I only say that because the point was not fully argued, the case might equally well be disposed of on another and shorter ground. What is meant by a provision being void as against the policy of the law? The phrase means no more than that the provision is not enforceable by any one or in any Court. This, as I have already said, is a limitation, and not a gift defeasible by the performance or non-performance of a condition. In other words, there is no condition which can be rejected because not allowed by law, and the limitation must be taken as a whole as it stands. The wife is not cohabiting with her husband, and she cannot insist on the gift of an annuity limited to endure only during cohabitation. Granted for the sake of argument on this point that the limitation is contrary to the policy of the law, then it is unenforceable, and not less or more so because the wife is not cohabiting with her husband. On this point the case seems to fall directly within the authority of *In re Moore* (1), already cited.

This further point was made. The deed provides that from and after the decease of the wife in the lifetime of the husband, or from and after the dissolution of their marriage or judicial separation between them, the annuity shall be held upon trust for the benefit of the husband and ultimately for the children. And this phrase, "after the dissolution of their marriage or judicial separation between them," is repeated several times in the provisions respecting the application of the settled property

(1) 39 Ch. D. 116.

KEKEWICH J.
1904
HOPE JOHNSTONE *In re.* HOPE JOHNSTONE *v.* HOPE JOHNSTONE.

which properly find a place in such an instrument. It is said that this phrase shews the intention of the settlor in limiting an annuity to the lady so long as she shall continue the cohabiting wife, and that as there has been no dissolution or judicial separation nothing has occurred to determine the annuity, which must, therefore, be taken to be still subsisting. If I am right in thinking that the gift is by way of limitation only, a decision favourable to the wife on this point would not assist her; but I am not prepared to give such a decision. I do not think that entirely different words used in other parts of the deed can be imported into the limitation, so as to enable the Court to give it a meaning different from that which according to ordinary interpretation of the language used it would bear.

Solicitors: *Minet, Harvie, May & Co.; Campbell & Baird.*

H. B. H.

BYRNE J.
1904
Jan. 28.

In re FOX.
WODEHOUSE *v.* FOX.

[1903 F. 1948.]

Will—Appointment—Advancement—Hotchpot.

The testator by his will left his residuary estate upon trust for his wife for life, and gave her power to appoint the funds amongst their four children. In default of appointment the children were to take equally. Any child who had received any part of the funds under any appointment was, in default of appointment to the contrary, to bring the appointed funds into hotchpot. The will also contained an advancement clause. After the testator's death 705*l.* was advanced to R., one of the children. The widow subsequently by her will appointed one equal fourth part of the property of which she was tenant for life to each of two of her children absolutely, and one equal fourth part upon trust for each of her other children (of whom R. was one) respectively for life, with remainder to their respective children. The testatrix did not in her will make any reference to the advance to R.:—

Held, that R. was not liable to bring into hotchpot or account for the 705*l.* advanced to him out of his expectant share.

ORIGINATING SUMMONS.

The Rev. W. C. Fox by his will devised and bequeathed all

his real estate and the residue of his personal estate to trustees upon trust to pay the income to his wife for her life, and after her death "in trust for all such one or more exclusively of the others or other of my children, Eliza Frances Fox, Lionel Wodehouse Fox, Armine Wodehouse Fox, and Raymond Wodehouse Fox, or their issue respectively born or to be born during the life of my said wife, or within twenty-one years after her death, at such age or time or respective ages or times, if more than one, in such shares and with such future executory or other trusts for the benefit of the said issue, or some or one of them, with such provisions for their respective advancement, maintenance, or education at the discretion either of the said trustees or trustee, or of any other persons or person, and upon such conditions with such restrictions and in such manner as my said wife shall, whether covert or sole, by will or codicil appoint, and in default of such appointment, and so far as no such appointment shall extend, in trust for all such of my four last-mentioned children living at my death, and of the children then living or afterwards born of any such child or children having died in my lifetime as being male attain the age of twenty-one years, or being female attain that age or marry under that age, if more than one as tenants in common in equal shares, so that my children who shall be objects of this trust shall take in equal shares, and the children being objects of this trust of any child of mine having died in my lifetime shall take equally between them the share which the parent would have taken had he or she survived me. Provided always that no child who or whose issue shall take any part of the said premises under any appointment in pursuance of the power hereinbefore contained shall, in default of appointment to the contrary, have or be entitled to any share of the unappointed part of the said trust premises without bringing the share or shares appointed to him or her or to his or her issue into hotchpot, and accounting for the same accordingly. Provided always and I hereby declare that it shall be lawful for the said trustees or trustee after the death of my said wife or previously thereto, with her consent in writing, to raise any part or parts not exceeding in the whole

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one-half of the then expectant or presumptive share of any child under the trusts hereinbefore declared, and to apply the same for his or her advancement or benefit as the said trustees or trustee shall think fit."

The testator died in October, 1883. In 1890 the trustees at the request of the widow advanced to Raymond, under the advancement clause in the testator's will, 400*l.* to enable him to be articled to a solicitor. In December, 1894, they similarly advanced to him 305*l.*

On June 22, 1898, the widow made her will, and thereby, after reciting the power given to her by her husband's will "to appoint his real and residuary personal estate of which I am tenant for life," appointed that the trustees should stand possessed of the trust estate "upon trust, as to one equal fourth part or share thereof, for my said daughter Eliza Frances Williams absolutely for her own benefit, and as to one other equal fourth part or equal share thereof upon trust for my said son Armine Wodehouse Fox absolutely for his benefit, and as to one other equal fourth part or share thereof upon trust to retain the same and pay the income thereof to my son Lionel Wodehouse Fox until his death, or until he shall become bankrupt, or assign or charge the said income or some part thereof," and then upon other trusts. The testatrix gave "the remaining fourth part or share of my husband's trust estate upon trusts similar in all respects mutatis mutandis in favour of my son Raymond Wodehouse Fox to those hereinbefore expressed with reference to the one-fourth share hereinbefore appointed in favour of the said Lionel Wodehouse Fox."

On December 8, 1900, the testatrix made a codicil to her will, and directed that another sum of 700*l.*, which had been advanced by Eliza Frances Williams's husband to Raymond Wodehouse Fox, should in the division of the testator's estate be charged upon the share directed to be retained for Raymond, and added to the share given to Eliza.

By a second codicil, dated March 29, 1901, Mrs. Fox directed that the trustees should have power to apply half the share of Lionel and Raymond for their advancement respectively, and

she gave Raymond a general power of appointment over his share. Neither her will nor her codicils contained any reference to the advance of 705*l.* to Raymond.

Mrs. Fox died on July 9, 1901.

The trustees of the Rev. W. C. Fox's will took out a summons asking, first, whether the 705*l.* advanced to Raymond out of his expectant share ought to be brought into hotchpot or accounted for; and, secondly, if so, in what manner it was to be done.

H. M. Humphry, for the trustees.

T. K. Crossfield, for Raymond Wodehouse Fox. Raymond is entitled to retain the 705*l.* which was advanced to him, and also to have a life interest under his mother's will in one-fourth of the remainder of the trust funds. The advances were irrevocable, and the amount was thereby withdrawn from the settlement and no longer formed part of the settled funds: *In re Gosset's Settlement* (1); *Lawrie* v. *Bankes*. (2) The money advanced became Raymond's property for all purposes. The widow had, therefore, only power to appoint property which had not been advanced. She did not purport to deal with this sum by her will, for she recited that the power was to appoint the property of which she was tenant for life. She had parted with this 705*l.*, and was no longer tenant for life of it. Her trustees could not "retain" it, for it was gone. The codicils shew that she meant Raymond to have an interest in a share equal to the other shares.

J. E. Harman, for the brothers and sister of Raymond. The two wills must be read together, and it then becomes clear that the 705*l.* must be brought into account. The power of appointment is a special power, and the appointment must be read into the father's will. Raymond has received this money under his father's will as part of his share, and he must account for it.

The 705*l.* was not taken out of the trust estate. The ordinary practice of conveyancers is to treat the trust estate as consisting of the remaining investments, plus any money which

(1) (1854) 19 Beav. 529, 535. (2) (1857) 4 K. & J. 142, 151.

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has been advanced: Davidson's Precedents, 3rd ed. vol. iii. Part II. p. 772.

[BYRNE J. The hotchpot clause only applies in default of appointment. Mrs. Fox has exercised her power and deliberately abstained from making the shares equal.]

She was dealing with everything which could form part of her estate, including the 705*l.* It had not been taken out of the estate for all purposes. In *In re Gosset's Settlement* (1) the question was whether the money paid to the son was appointed to him or taken as an advance. The judgment was on that point only, and it was held that the hotchpot clause applied. That case did not decide that money which had been advanced was taken out of the estate altogether. We do not contend that Raymond can be called upon to refund three-fourths of the 705*l.*, but that it formed part of the estate which Mrs. Fox appointed. The codicils shew that equality was intended.

If the two wills are read as one, the rule against double portions applies to this case.

The second question does not arise if the 705*l.* is not to be brought into account.

BYRNE J. stated the facts, and continued:—There are expressions in the lady's will in which she speaks of the residuary estate of which she was tenant for life. There is no reference in it to the advances of 705*l.* to Raymond. It is argued that Raymond ought to bring into account, or that there ought to be brought into account, from the share given to him and his children, a sum equal to the advances made to him. It is admitted that the hotchpot clause has no application to the matter, and that there is no general equity that a person who has been advanced should repay the sum advanced in such circumstances as these. The question is whether, looking at the appointment which has been made, there was an intention that this 705*l.* should be brought into account. I think it clear that such advances as these take the sum advanced out of the trust estate altogether: *In re Gosset's Settlement.* (2) There the will contained a power of advancement, a power of

(1) 19 Beav. 529. (2) 19 Beav. 535.

appointment, and a hotchpot clause applicable to the former and not to the latter. The Master of the Rolls said: "An advancement has a definite meaning distinct from an appointment. It means that a certain portion of the fund is actually taken out of the settlement altogether, and paid over to the object of the power. But an appointment deals only with the reversion of the fund, leaving the previous life interests untouched." And in *Lawrie* v. *Bankes* (1), where there had been an advance to a son for the purpose of procuring a commission and he had got possession of the fund, it was held that the amount of the advance was taken out of the trust estate so as to free him from any liability to bring it into account. The last paragraph of the head-note says: "Proceeds of the sale by an infant of his commission in the army, purchased three months previously at his request by his trustees, under a power to raise money for his maintenance and advancement out of a fund in which he had only a contingent interest:—*Held*, in the absence of fraud, to belong to the infant, although the trustees' object in exercising the power had failed ab initio." It appears to me, looking at the will of the widow, that I cannot find anything to make me say that she made an appointment of what at that time constituted her husband's estate so as to ensure the bringing of the advance into account. There is nothing unreasonable in such a scheme as this, for it is always in the power of the appointor to appoint so as to make it certain that money advanced shall be accounted for. As I read her will, the widow intended to appoint the funds so that Raymond should not be liable to account for the 705*l*.

Solicitors: *Gribble, Oddie, Sinclair & Johnson, for Osborne, Ward, Vassall & Co., Bristol; C. E. S. Whitford.*

(1) 4 K. & J. 142, 151.

H. C. R.

BYRNE J.

1904

Jan. 29, 30.

CARMICHAEL *v.* EVANS.

[1904 C. 186.]

Partnership—Expulsion Clause—Conduct detrimental to Partnership Business—Breach of Duty as a Partner—Conviction by Police Magistrate—Dishonesty—Interim Injunction.

Articles of partnership provided that in the event of either of the junior partners being "addicted to scandalous conduct detrimental to the partnership business," or being guilty of "any flagrant breach of the duties of a partner," the senior partner might give the offending partner six days' notice of expulsion from the partnership. One of the junior partners having been convicted by a police magistrate of travelling without a ticket with intent to avoid payment, and fined the full penalty, the senior partner served him with notice of expulsion. On motion by the junior partner for an interim injunction to restrain his expulsion :—

Held, that, as the plaintiff had been convicted of dishonesty, the notice of expulsion was justified, and under the circumstances the Court declined to interfere by interlocutory injunction.

MOTION.

This was an application for an interim injunction by the plaintiff, Peter Carmichael, to restrain his expulsion from a partnership under the following circumstances.

In July, 1901, articles of partnership were entered into between the defendant, Mrs. Elizabeth Harries Evans, J. B. Harries, and the plaintiff whereby the parties became partners in a business of general drapers, carried on under the style or firm of "Tudor Brothers," in Brompton Road. The business had been formerly carried on by the defendant, and the bulk of the capital was provided by her, the plaintiff and Harries being salaried partners, with a further interest of an eighth share each in the net profits of the business. By the terms of the partnership deed Mrs. Evans had the general control of the direction of the business, the right to require the other partners to devote the whole of their time to the business, while she was bound only to devote so much of her time to it as she might think fit. By clause 22 of the deed it was provided, amongst other things, that, in the event of Harries or the

plaintiff, or either of them, being addicted to notorious intemperance or immorality or other scandalous conduct detrimental to the partnership business, or at any time during the partnership permitting or being guilty of any breach of any of the conditions of the deed, or any flagrant breach of any of the duties of a partner, or failing to account for moneys received, the defendant was to be at liberty to remove either or both of them from the partnership on giving to either or both not less than six days' notice in writing, and thereupon the partnership was to cease and determine at the expiration of such notice as regards the person to whom it was given. The defendant was also empowered in this event to publish a notice of the partial or total dissolution of the partnership as might be required; the deed also contained provisions for ascertaining the value of the interest of the expelled partner. On December 31, 1903, the plaintiff was convicted in the Westminster Police Court for having travelled on the London, Brighton and South Coast Railway without a ticket and fined 40*s.* and 2*l.* 2*s.* costs. A report of this conviction appeared in several of the daily papers, but in none of them was any reference made to the fact that the plaintiff was a partner in "Tudor Brothers," though his full name was given, and he was described as "managing partner of a large drapery firm in Brompton Road." The defendant, having seen an account of this conviction in one of these papers, and having made inquiries as to the facts therein alleged, determined to put the expulsion clause of the partnership in force, and on January 14 last she sent the plaintiff the following notice: "In consequence of your recent conviction at the Westminster Court for travelling on the London, Brighton, and South Coast Railway with intent to avoid payment, I hereby give you notice, in pursuance of the articles of partnership under which the business of Tudor Brothers is carried on by you, Mr. Harries, and myself, that the said partnership shall cease and determine so far as concerns yourself on the expiration of one week from this date." The plaintiff thereupon commenced the present action against Mrs. Evans, claiming a declaration that the notice of dissolution of

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January 14 was void, an injunction to restrain the defendant from excluding him from the partnership, and from publishing the dissolution; and he now moved for an interim injunction to restrain his exclusion from the partnership until trial of the action and to restrain the defendant from publishing the dissolution. It appeared from the evidence on both sides that the plaintiff had been a season-ticket holder on the London, Brighton and South Coast Railway for some years, that his season ticket had expired on September 8, 1903, and that it had not been renewed on November 27, the day on which he was detected travelling without a ticket. The plaintiff, in his evidence, alleged that he had been ill and overworked and that he had always intended to renew his season ticket, that he had usually in the meantime taken a daily ticket, but on this occasion he had inadvertently omitted to take a ticket.

He further alleged that as the name of Tudor Brothers was not mentioned in the newspapers, and it was not generally known that he was a partner, no harm whatever had been done to the business by the report of his conviction. Evidence to the same effect was given by the other salaried partner Harries.

On the other hand, the defendant in her evidence stated that the effect of this conviction was most injurious to the business; that the whole staff of the firm of Tudor Brothers, comprising male and female shop assistants, buyers, counting-house clerks, and porters knew that the plaintiff was a partner; the wholesale houses from whom goods were purchased knew that the plaintiff was a partner of the firm, and many of the customers also had similar knowledge; that from the point of view of discipline and control of the members of the staff, from the point of view of business dealings with wholesale houses, with whom the credit of the firm and of the individual partners was of the highest importance, and from the point of view of the customers with whom business was transacted, the widely spread report that a member of the firm had been convicted, in the words of the magistrate, of a "shabby fraud" could not but detrimentally affect the welfare of the business. The defendant's husband, who was himself engaged in a large

business of a similar nature, took the same view of the effect of the plaintiff's conviction. There was also evidence that the plaintiff's brother, a builder, had considered it necessary since the plaintiff's conviction to advertise in the daily papers and trade journals that his business was in no way connected with the plaintiff.

Rowden, K.C., and *G. Henderson*, for the plaintiff. Expulsion clauses are always construed strictly, in consequence of the abuse that may be made of them and of the hardship of expulsion: Lindley on Partnership, 6th ed. p. 427. The object of a clause of this kind is to protect the partnership; except the assertion of the defendant, there is no evidence that any harm has been actually done to the partnership business by this conviction. In *Snow* v. *Milford* (1) there was a power of expulsion for any act "to the discredit or injury of" the partnership; one partner was convicted of immorality, and yet the other partner was not allowed to put the expulsion clause in force, as the act complained of was not per se prejudicial to the partnership. At any rate there is a serious question to be tried whether this notice of expulsion is good, and the Court ought to maintain the status quo pending the trial.

[BYRNE J. offered to make arrangements by which the action might be finally tried within a fortnight, the plaintiff in the meantime to keep away from the partnership premises. This offer was, however, refused by the plaintiff.]

Not to maintain the status quo may cause the plaintiff irreparable injury; and if the fact that he is a partner is not generally known, his continuance in the business will do no injury to the defendant. On the balance of convenience, an injunction should be granted. It cannot be said that the act for which the plaintiff was convicted amounts to "being addicted to scandalous conduct," or is a "flagrant breach of the duties of a partner" as provided by clause 22.

Levett, K.C., and *M. Romer*, for the defendant. The status quo will not be maintained if an interim injunction is granted, because the defendant will be tied till the trial to carry on

(1) (1868) 18 L. T. 142.

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business with a partner who has been convicted of dishonesty. The defendant has by far the largest interest in the business; she says that the plaintiff's conviction is detrimental to the business, and she gives very good reasons why this should be so. Mutual trust and absolute honesty are the essential features of partnership; the plaintiff was convicted of an act contrary to good faith, an act which is a flagrant breach of the duties of one partner towards his copartners. There is no suggestion that this notice of expulsion has been given otherwise than in good faith; there is no dispute that the plaintiff was convicted of travelling without a ticket "with intent to avoid payment"; dishonest conduct is a ground for immediate dissolution: *Essell* v. *Hayward*. (1) The balance of convenience, so far as the defendant's interest is concerned, is that the partnership should be ended, and it is not a case in which the Court ought to interfere by interim injunction.

Rowden, K.C., in reply.

Cur. adv. vult.

Jan. 30. BYRNE J., after stating the object of the motion and the effect of the partnership deed, and having read clause 22, continued:—It has been said in argument, and justly, that, a clause of this description being of a very stringent character, the Court must be careful to see that it is reasonably and fairly exercised, and that events have happened which justify expulsion before allowing it to be acted on. Having said that, I ought to add that in the present case there is no contest at all as to the main facts. The plaintiff was a season-ticket holder and in the habit of travelling daily to and from London. On September 8, 1903, he allowed his ticket to expire, and up to November 27 of the same year he had failed to renew it; on that day he was detected travelling without a ticket. Proceedings were subsequently taken by the railway company in the police court, under the Regulation of Railways Act, 1889, s. 5, sub-s. 3 (*a*), which imposes a penalty in the case of a person travelling without having previously paid his fare "with intent to avoid payment thereof." He

(1) (1860) 30 Beav. 158.

was convicted and fined the full penalty with costs. I neither desire to exaggerate nor to minimise the nature of the offence, nor do I desire to dwell upon the circumstances more than to say that the circumstances in connection with this conviction, so far as there is no dispute about them, induce me to believe that this was a bad instance of defrauding the railway company. The period of two and a half months was allowed to elapse without renewal of the season ticket, and the excuses given appear to me to be wholly insufficient. An account of what had taken place before the police magistrate appeared in several of the daily papers. Although the literal accuracy of the report in the *Daily Telegraph* is not strictly proved, it is proved that this newspaper has published to the world remarks attributed to the magistrate shewing that he was of opinion that the case was one of continued fraudulent conduct. The plaintiff does not challenge the accuracy of the accounts published, but he says that this is not a matter which is calculated to be injurious to the business, and he has made an affidavit to that effect, in which he says that the name of the firm of "Tudor Brothers" was not mentioned, nor the names of the partners, and that it was not generally known that he was a partner. On the other hand I have the evidence of Mrs. Evans and her husband, who was proprietor of and still is interested in another large drapery business in London, to the effect that a conviction of this kind would be most injurious to the business, and, moreover, that the fact of the plaintiff being a partner in this business was largely known to customers, employees, and others. [After referring to the way in which the plaintiff had been described in the newspapers to shew that they furnished means of identification, and having stated in detail the evidence of Mrs. Evans and her husband as to the probable injury this kind of conduct might cause to the business, and having specially mentioned the fact that the plaintiff's brother had thought it necessary to advertise that he was not connected in business with him, his Lordship continued :—]

Now apart from the question on the facts, I go to the actual clause itself, which, amongst other things, provides that if Peter

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Carmichael is "guilty of any flagrant breach of any of the duties of a partner," then the clause is to operate. I conceive it to be one of the first duties of a partner to be an honest man, and that not merely in his accounts as between himself and his partners, but in relation to third persons, at least to the extent of abstaining from being guilty of a fraud bringing him within the penalties of the criminal law. Supposing this had been the case of picking a pocket, I do not suppose his counsel would have ventured to say that it was not a flagrant breach of his duty. I find that the plaintiff has been convicted, and convicted of fraud under circumstances which, so far as I can see, afford no reasonable ground for saying that it was not of its kind a bad case.

Under those circumstances the argument was urged that the question in the action cannot now be finally disposed of, and that upon motion the Court is not in the habit of allowing clauses of this description to be acted upon, but leaves the matter to be determined at the trial, only taking care to preserve the status quo in the meantime. But, as I have observed, the material facts in the present case are admitted; there is no question as to the conviction, or as to the circumstances under which the conviction took place; and in my judgment there is the strongest probability that the decision at the trial will be that there was justification for giving the notice which was given. I was appealed to on the ground of balance of convenience. To my mind, in the present case the balance both of convenience and of justice points to non-interference at the instance of the plaintiff. It is not immaterial in considering this question to remember that I offered the parties to make arrangements that the whole case might be finally tried within a fortnight, but that was refused on behalf of the plaintiff, although the defendant was willing to accept the proposition, if the plaintiff would take a holiday and keep away from the business till the matter could be determined. But apart from this, if it be true, as I think it is, that the conduct of the partner is detrimental to the partnership business, and likely to do serious injury, that injury would be going on during the interval between now and the trial, whereas the

exclusion of the plaintiff from the business would not inflict irreparable injury upon him, and he would have his remedy, if at the trial it should turn out that he was right, and that he ought not to have been excluded. I agree that it is an exceptional case in its circumstances, but I do not feel justified in granting an interlocutory injunction, and I therefore refuse the motion.

[Leave to serve short notice of appeal from this refusal was subsequently obtained; but the appeal was not proceeded with, as the parties eventually arrived at a settlement.]

Solicitors: *Mackrell, Maton, Godlee & Quincey; Nicholson, Graham & Graham.*

W. C. D.

In re ALLEN AND DRISCOLL'S CONTRACT.

[1903 A. 1699.]

Vendor and Purchaser—Outgoings—Charge of Expenses on Frontager's Premises—Date from which Charge takes Effect—"Completion of Works"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

The expenses incurred by a local authority, under the Public Health Act, 1875, in the execution of paving and other works required to be done by s. 150, first become "a charge on the premises in respect of which they were incurred" within the meaning of s. 257 from the date of the completion of the works.

Observations of North J. in *In re Bettesworth and Richer*, (1888) 37 Ch. D. 535, and of the Court of Appeal in *Stock* v. *Meakin*, [1900] 1 Ch. 683, at p. 691, discussed and applied.

ADJOURNED SUMMONS.

This was an application under the Vendor and Purchaser Act, 1874, which raised a question on the construction of s. 257 of the Public Health Act, 1875, the point being the exact date at which expenses incurred by a local authority under the Public Health Act for paving and other works first become "a charge on the premises in respect of which they were incurred." The material facts were as follows:—

By an order of July 22, 1903, made in an action of *Allen* v. *Driscoll* [1902 A. 1819], the defendants were ordered to pay

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to the plaintiffs, on or before September 29, 1903, the sum of 4440*l.* in settlement of the purchase-money and interest due in respect of eleven leasehold houses in Rusthall Avenue, Acton, Middlesex, the plaintiffs by their counsel undertaking to make a good title to the said leasehold houses, and to assign the same to the defendants, the defendants by their counsel undertaking to accept the leasehold houses so assigned in their present condition; and the plaintiffs were to receive the rents and pay the outgoings in respect thereof up to the said 29th September next.

In February, 1903, notices under the Public Health Act, 1875, s. 150, to pave and make up the roadway in front of these eleven houses were duly served upon the vendors by the Acton Urban District Council. Default having been made in complying with these notices, the urban district council on July 7, 1903, entered into an agreement with a contractor for the execution of the works specified in the notices in respect of the said eleven houses, and the other houses in Rusthall Avenue, for a sum of 2566*l.* The whole of the work specified in the said notices was not completed by September 29, the carriage-way in front of the eleven houses requiring a further three-inch layer of flints to be laid and rolled, and no apportionment of the expenses attributable to the eleven houses had been made at this date or subsequently. The purchasers required that the costs of these works should be paid by the vendors before completion; and as this demand was disputed by the vendors, the purchasers took out the present summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the vendors were liable to pay and indemnify the purchasers against the amount, when apportioned, of the expenses incurred by the local authority under the Public Health Act, 1875, for paving and other works in respect of the eleven houses in Rusthall Avenue, and that they might be ordered to pay and indemnify the purchasers against the same accordingly.

W. H. Cozens-Hardy, for the purchasers. The charge comes into existence as soon as the liability for the expenses of paving

are incurred by the local authority; in the present case, in July, 1903, when the agreement for the execution of the works mentioned in the notices was entered into with the contractors, or certainly as soon as money was paid under the contract. Expenses were clearly incurred before the date fixed for completion. This contention is supported by observations in the judgments in *Tottenham Local Board of Health* v. *Rowell* (1) and *West Ham Corporation* v. *Grant* (2), though the question before the Court in those cases was different from the question here. In *In re Bettesworth and Richer* (3) and in *Stock* v. *Meakin* (4) the question was whether the liability to pay attached on completion of the works, or only after apportionment, and the Court held that completion of the works was the date; but none of these cases expressly decide that the period at which the expenses become a charge may not be at an earlier date than completion of the works. The precise question now raised did not arise in *Stock* v. *Meakin* (4) or in *Surtees* v. *Woodhouse*. (5) The purchaser is, therefore, entitled to have the cost of these paving works paid by the vendors.

Norton, K.C., and *Ashton Cross*, for the vendors. The expenses incurred only become a charge on the completion of the works; that seems clear from *Stock* v. *Meakin* (4), and from the reasoning of North J. in *In re Bettesworth and Richer*. (3) The cases relied on for the purchasers are distinguishable and do not deal with the present case, which is practically covered by the decision in *Stock* v. *Meakin* (4), which was followed again in *Surtees* v. *Woodhouse*. (5) The works not having been completed on September 29, the charge had not attached, and is therefore payable by the purchasers.

[*In re Waterhouse's Contract* (6) and *Newcastle-upon-Tyne Corporation* v. *Houseman* (7) were referred to.]

W. H. Cozens-Hardy, in reply. None of the cases cited are precisely in point, though the inference that can be drawn from *Tottenham Local Board of Health* v. *Rowell* (1) and *West Ham*

(1) (1880) 15 Ch. D. 378, 392.
(2) (1888) 40 Ch. D. 331, 335.
(3) 37 Ch. D. 535.
(4) [1900] 1 Ch. 683.
(5) [1903] 1 K. B. 396.
(6) (1900) 44 Sol. J. 645.
(7) (1898) 63 J. P. 85.

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Corporation v. *Grant* (1) is that the charge comes into being as soon as the expenses are incurred, though the remedy for recovering the amount from the owner cannot be enforced till completion of the works. In *Surtees* v. *Woodhouse* (2) the only question was the meaning of "outgoings" in a lease.

BYRNE J. In this case a vendor and purchaser summons has been taken out for the determination of the question whether or not the expenses referred to in s. 257 of the Public Health Act, 1875, were a charge upon the premises prior to the completion of the works in respect of which notice under s. 150 had been given, and I think Mr. Cozens-Hardy has shewn that the precise point has not, on the reports, been directly disposed of—that is to say, no authority has in terms held that the period may not be an earlier date than the completion of the works. [Having shortly stated the facts, his Lordship continued:—]

The crucial date is the date fixed for completion of this purchase, September 29; and the question is whether these expenses were incurred within the meaning of the section before that date. In other words, what is the meaning of this s. 257? The works were not then completed, although I am told that payments had been made on account under the contract.

Now in *Tottenham Local Board of Health* v. *Rowell* (3) Brett L.J. refers to the clause in these terms: "The condition upon which the charge is made to arise is nothing but this, 'Where the local board have incurred expenses for the repayment whereof the owner is made liable.' Directly, therefore, the local board have incurred such expenses, the section must be read as if immediately after that there came these words, 'Such expenses shall be a charge on the premises,'—therefore directly from the moment the expenses which are named in that section have been incurred, such expenses are a charge on the premises, that is, the charge is imposed then and there by the statute." Then, passing over a few words, he con-

(1) 40 Ch. D. 331. (2) [1903] 1 K. B. 396.
(3) 15 Ch. D. 378, 392.

tinues: "Therefore it seems to me that upon the reading of that section, this is a charge the moment the expenses are incurred, and it is a charge which exists although other remedies exist at the same moment that that commences, or other remedies may by different processes be made to arise either as against the owner, who is in the first place the person liable, or as against other persons." That leaves the question still open whether the date of completion is the actual time when the charge first arises, or whether the expenses may be said to have been incurred within the meaning of the section before completion. In the case of *West Ham Corporation* v. *Grant* (1) Kay J. had to deal with another Act, and the question in the case was not the same as the one which arises here, but in dealing with s. 257 he says: "I need not pause to say what 'expenses incurred' may possibly mean, or whether the term implies actual payment of the expenses or not, because, at the least, it means money which the authority may have paid or become liable to pay. I do not mean to give that as a definition, but it must mean that at the least." It is obvious the learned judge there determined no question whether the period when the expenses were considered to be incurred was the date of completion or some earlier date. Then there is the decision in the case before North J., *In re Bettesworth and Richer.* (2) He says, after referring to the case of *Reg.* v. *Swindon New Town Local Board* (3) and what Cockburn C.J. said there: "Therefore it comes to this, that the expenses are charged from the time of the completion of the work. That seems to me the construction of the section. And in that view I am fortified by the opinion of the judges who decided the case of *Tottenham Local Board of Health* v. *Rowell* (4), when they had that case before them on the construction of a section in an earlier Act, which does not appear in this respect distinguishable from the Public Health Act, 1875. It is quite true that the owner cannot be compelled to pay till the total costs have been made out and apportioned between the owners, and notice has been served, and he has had three months to dispute the

(1) 40 Ch. D. 331, 335.
(2) 37 Ch. D. 535, 539.
(3) (1879) 4 Q. B. D. 305.
(4) 15 Ch. D. 378.

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apportionment, and at the end of the three months has had written demand served upon him. The Act says payment may be recovered from the person who is owner at the time when the works were completed, and he is the person charged under the Act."

Now I come to the later cases in which the matter has been dealt with; but, again, the question not arising as it does here. In *Scott* v. *Meakin* (1), a case between a vendor and purchaser, it was held that the amount of the apportioned expenses of private street works becomes, under the Private Street Works Act, 1892, a charge on the premises in respect of which they are apportioned, as from the date of the completion of the works, and not merely as from the date of the final apportionment; and the head-note goes on: "If, therefore, the premises are sold by the owner free from incumbrances after the completion of the works, but before the date of the final apportionment, the vendor must indemnify the purchaser against the sum finally apportioned in respect of the premises." It was not necessary to decide, as against an earlier date, that the date for completion of the work was the date from which the charge took effect, but the Court expressed the opinion that that was the date, because the learned judge delivering the judgment of the Court said (2): "The charge under the Public Health Act, 1875, however, is a charge which can only arise on the failure of the owner of the land to comply with the notice of the urban authority and the execution by the urban authority of the works by reason of that default of the landowner, and is, moreover, a charge taking effect from the date of the completion of the works"; and then he refers to the case of *In re Bettesworth and Richer* (3) and says: "it was held in *In re Bettesworth and Richer* (3) that the expenses become a charge upon the completion of the works," not putting in any qualifying words like "at least," or anything of the kind. Speaking of the last-mentioned case he says: "This decision turned entirely on the words of ss. 150 and 257, which plainly gave a charge so soon as the works had

(1) [1900] 1 Ch. 683. (2) [1900] 1 Ch. 691, 692.
(3) 37 Ch. D. 535.

been completed and the expenses incurred by the local authority on the failure of the owner of the land to execute the works in compliance with a notice served in pursuance of the powers given by s. 150."

From *Surtees* v. *Woodhouse* (1), the last case referred to, I take one judgment in the Court of Appeal. I agree here again that the question was not the question that I have now to determine. Speaking of *Stock* v. *Meakin* (2) Stirling L.J. reading his judgment says (3): "The nature of the outgoing in question was considered by the Court of Appeal in the case of *Stock* v. *Meakin* (2), and it was held that the amount of the expenses incurred under the Private Street Works Act, 1892, becomes a charge on the premises on which they are apportioned as from the date of the completion of the works, and not from the date of the final apportionment. It was not expressly decided in that case whether or not the amount is 'charged on the owner in respect of the premises' as from the same date."

In the result, it appears to me that the authorities shew, although the precise point has not been actually decided, that the construction I ought to put upon s. 257 is, that the expenses incurred by the local authority, within the meaning of this section, become a charge upon the premises so soon as the works have been completed for which such expenses were incurred; or, in other words, that the charge here referred to first arises on completion of the works. I therefore make a declaration that the vendors are not liable to pay for these works.

Solicitors: *T. Blanco White; Taylor, Willcocks & Lemon.*

(1) [1903] 1 K. B. 396. (2) [1900] 1 Ch. 683.
(3) [1903] 1 K. B. 401.

W. C. D.

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July 23, 29, 30;
Nov. 5.
1904
Feb. 12.

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[1893 S. 4734.]

Company—Debenture—Deficient Security—Principal or Interest—Appropriation—Income Tax.

By a debenture trust deed it was provided that the trustees should appropriate the proceeds of realization of the securities in the first place towards payment of all arrears of interest on the debentures; and, secondly, towards payment of the principal. The company made default; a debenture-holder's action was brought, and the trusts of the deed were ordered to be carried into execution. The securities were gradually realized. Orders were from time to time made under which certain sums were paid on account of interest after deducting income tax, and under other orders payments were made on account generally of what was due for principal and interest. The securities had now all been realized, and the trustees had in their hands a sum of money which they proposed to pay to the debenture-holders. It was admitted that if the whole of the payments were attributed to principal they would be insufficient to discharge the full amount due. The Inland Revenue authorities claimed that all the payments on account generally ought to be attributed to interest in the first place, and that income tax should be deducted from them:—

Held, that the provision in the trust deed for payment of interest in the first place was inserted for the benefit of the debenture-holders, and could be waived by them in the absence of opposition by the debtors; that, as between themselves and the trustees, the debenture-holders must elect whether they would take the money as principal or interest, without prejudice to the question whether in their hands it would afterwards be treated differently; and that income tax would be payable only out of such part of the funds as the debenture-holders elected to take as interest.

SUMMONS in a debenture-holder's action.

By a trust deed dated June 29, 1892, and made between the Jarvis Conklin Mortgage Trust Company of the one part, and the Law Guarantee and Trust Society, Limited, of the other part, a security was created in favour of the defendant society upon property of the company to secure the principal moneys and interest for which the company should become liable under its debentures. By this deed provision was made by clause 9 for realization in case of default, and by clause 11 it was provided that "The trustees shall hold the money to arise under

clause 9 from the securities appropriated for each series of the debentures upon trust thereout in the first place to pay or retain the cost and expenses incurred in or about the execution of the trusts hereof including their own remuneration, and to apply the residue of such moneys first in or towards payment of all arrears of interest remaining unpaid on the debentures of such series; secondly, in or towards payment to the debenture-holders of such series pari passu in proportion to the debentures of such series held by them respectively, and without any preference or priority on account of priority of issue or otherwise howsoever of all principal moneys due on such debentures, and that whether the same principal moneys shall or shall not then be payable according to the tenor of the same debentures; and, thirdly, to pay the surplus of such moneys to the company or its assigns." Clause 13 was as follows: "Upon any payment under clause 11 hereof to the registered holder of a debenture on account of the principal moneys or interest thereby secured, the trustees shall be entitled to require the production of any debentures in respect of which they are making payment to the holder of any principal money or interest thereby secured, and the trustees shall, in the event of production, cause a memorandum of the amount and date of payment to be indorsed thereon, but the receipt of the registered holder of each of the debentures, or in the case of joint holders of any one of the registered joint holders, as regards the principal money expressed to be thereby secured, and the delivery to the trustees of each of the interest coupons as regards the interest therein mentioned, shall be a good discharge to the trustees, who shall be entitled in their reasonable discretion to dispense with the production of the debenture upon a proper indemnity being given, but shall not be entitled to dispense with the production of the coupons." By clause 14 "the company will pay the principal moneys and interest secured by the debentures in accordance with the tenor thereof respectively." By the judgment in the action, dated December 8, 1893, the defendant society undertaking, until further order, not to part with, or dispose of, without the leave of the Court, any of the securities still in their hands in England, or which should thereafter

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come to their hands in England, comprised in the said trust deed, it was declared that the mortgage debentures of the series "C" constituted a first charge upon all property and effects comprised in the deed, and that the trusts of such deed ought to be performed and carried into execution, and the usual accounts and inquiries in a debenture-holder's action were directed, the first being an account of what was due for principal and interest to the holders of the "C" series of debentures. By an order of August 6, 1894, it was ordered that the defendant society should be at liberty to pay 2 per cent. on the amount of the debentures of the "C" series on account of interest in arrear. By an order of April 2, 1895, it was ordered that the defendant society should, out of the funds in their hands to the credit of income, pay on account of arrears of interest due on debentures a further dividend of 2 per cent. on the capital amount of the debentures, and that the trustees should be at liberty to pay the income tax thereon, and on the last payment under the order of August 6, 1894. These orders were duly acted upon and payments made accordingly. The certificate was filed on April 24, 1895, whereby it was found that there was due to the holders of the "C" debentures the sum of 123,000*l.* for principal and a sum of 8702*l.* 6*s.* 5*d.* for interest, calculated up to October 1, 1894. This date was the last half-yearly date prior to the making of the certificate for payment of interest under the debentures. The schedule to the certificate shewed the names of the then holders of the debentures and the amounts respectively due to them for principal and interest to the same date. In pursuance of an order of June 14, 1895, a further sum was paid on account of interest, income tax being duly deducted and paid by the defendant society. On June 15, 1896, upon a summons taken out by the plaintiff, which came before the judge in chambers personally, an order was made whereby it was ordered that the defendant society should be at liberty out of cash in their hands to pay the balance of interest found due to October 1, 1894, by the chief clerk's certificate, and then out of any surplus to pay a dividend of 1 per cent. on account of what was due on the debentures. In fact under this order the actual amount paid in respect of

interest appeared to have exceeded (with the amounts previously paid) the amount found due. Income tax was duly paid on this. By an order of July 21, 1897, it was ordered that the defendant society should be at liberty out of cash in hand to pay a dividend of 10 per cent., calculated on the face value of the debentures, on account generally of what was due on the said debentures for principal and interest, and having regard to the fact that the registers of the company had been removed to New York and were not open to inspection, and having regard to the chief clerk's certificate and to the notices received by the defendant society of devolution of interest in debentures since the certificate, the defendants, the trustees, were to be at liberty to continue to make such payments to the debenture-holders mentioned in certain lists therein referred to. Further orders were from time to time subsequently made on similar terms to that last mentioned; and in all there had been paid to the debenture-holders a sum of 104,550*l.* on account generally of principal and interest. These moneys arose from realization from time to time of securities included in the trust deed by the defendant society. In April, 1897, there was a dividend paid direct from the general assets of the company under an American decree without any express direction as to its application for principal or for interest. The realization had now been completed, except to an amount which was not likely to exceed 4000*l.*, and the society as trustees had in hand a sum of about 1900*l.* It was estimated that the final dividend available for the debenture-holders would probably not exceed 5 per cent., calculated on the face value of the securities, and it was also admitted that if the whole of the past payments which had been made generally on account, and any further sums available for the debenture-holders, were attributed and applied solely in payment of principal, they would be insufficient to discharge the whole amount thereof.

The Inland Revenue authorities claimed income tax on all payments made generally on account of principal and interest, and a summons was therefore taken out by the defendant society asking for the directions of the Court as to whether the payments made to the holders of the "C" debentures under

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the order of June 15, 1896 (so far as it directed a payment of 1 per cent.), and under the orders of and subsequent to July 21, 1897, and any further payments to be made not exceeding in all the principal sums secured by the debentures, were to be treated as payments made wholly in respect of capital, or whether any, and if so what, parts thereof were to be treated as payments in respect of interest, and whether any, and if any what, provision ought to be made for income tax thereon.

E. Beaumont, for the Law Guarantee and Trust Society.

Levett, K.C., and *A'B. Terrell*, for the plaintiffs. No further income tax is payable. The orders are final and cannot be disturbed. The terms of the trust deed are not imported into these orders. The payments are made on account generally, and can be appropriated by the payee as he thinks fit. At most these payments may be treated as made rateably. Where payment is made definitely on account of principal and interest, it means a payment pro ratâ unless the payee has a right to appropriate. The security is deficient, and all payments will now be attributed to capital. Income tax is not payable on capital: *In re Middlesborough, &c., Building Society.* (1)

Ward Coldridge, for H. Newman, a debenture-holder. A creditor, in the absence of any directions to the contrary, can appropriate the payments made either to principal or interest: *Cory Brothers & Co.* v. *Owners of Turkish Steamship Mecca.* (2) The debenture-holders here have two distinct debts: there is the claim for principal and the claim for interest; from 1896 the Court has refrained from giving any directions as to interest, leaving it to the creditor to appropriate the payments as he thought best; the payments made do not amount to 20*s.* in the pound on the principal; therefore it is for the interest of the debenture-holders to appropriate the payments so made to principal.

Bower v. *Marris* (3) does not justify the claim of the Crown to income tax. Where the estate is deficient and the mortgagor is unable to pay, a mortgagee is entitled to appropriate

(1) (1885) 53 L. T. 492. (2) [1897] A. C. 286.
(3) (1841) Cr. & Ph. 351.

what he receives to principal: *Chitty* v. *Naish*. (1) The Customs and Inland Revenue Act, 1888, s. 24, does not compel the trustee to appropriate to the detriment of his cestui que trust. The policy of the Income Tax Acts is dealt with in *Foley* v. *Fletcher*. (2)

H. Whitten, a debenture-holder having liberty to attend, appeared in person and adopted this argument.

Vaughan Hawkins, for the Crown. Sect. 24 of the Customs and Inland Revenue Act, 1888, which makes it compulsory on any person through whom interest is paid to deduct income tax and render an account is quite general in its terms. The money in question in this case comes from a source which has not paid income tax, and it is the duty of the trustees to deduct the tax from it: *London County Council* v. *Attorney-General*. (3) The whole of the money ought to be applied in payment of interest. It is a question of the construction of the covering deed. There is a trust to pay the money in a particular way quite apart from whether there is sufficient to pay off all the capital or not. Clause 11 says that arrears of interest are to be paid first. Assuming that the doctrine of election can be applied as between principal and interest, the debenture-holders have no right under this deed to elect whether they will take this money as principal or interest. The authorities on that point cited by Mr. Ward Coldridge only refer to cases of distinct debts. Here there has been an irrevocable appropriation by the debtor in the trust deed. It is only where there has been no such appropriation that the creditor can elect. The general rule is that as between mortgagor and mortgagee interest must be paid before principal: Fisher on Mortgages, 5th ed. p. 723, s. 1514.

This money is not to be applied to principal and interest pro ratâ. The trust deed cannot be altered in that way. The trust of the proceeds in the power of sale in s. 21, sub-s. 3, of the Conveyancing Act is in general terms, but there is no power here to depart from this trust. The trusts have not been altered by any of the orders which have been made. The

(1) (1834) 2 Dowl. 511. (2) (1858) 28 L. J. (Ex.) 100.
(3) [1901] A. C. 26.

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whole question has been postponed, and can now be dealt with by the Court as if the whole fund had to be distributed.

No doubt where there is a deficiency, and money is paid in respect of the whole debt, the Court divides it according to well-known rules; but that has nothing to do with payment of income tax in the first instance. "When once the thing is ascertained as being subject to income tax, it matters not what is done with it afterwards": *H.R.H. the Nizam State Ry. Co.* v. *Wyatt.* (1) If the money is payable as interest it makes no difference that in the hands of the mortgagor it is treated otherwise because the security is deficient.

The Statutes of Limitations do not apply to a claim of this sort: s. 63, sub-s. 2, of the Taxes Management Act, 1880.

Levett, K.C., in reply. The point to be decided is what part is principal and what part is interest. Sect. 24 of the Act of 1888 has nothing to do with it: Dowell's Income Tax Laws, 5th ed. p. 420. The security is deficient, and the trust deed has ipso facto come to an end and does not affect the question; but, assuming that it is alive, it says that on default in payment the capital is to become payable. Clause 11 is the working section only whilst the debt is on foot. The principal, therefore, was payable on the date when the action was brought. It was not then known whether the security was sufficient. When a security is realized and is deficient the Court ceases to order payment of interest, and appropriates the whole to principal. The Court is dealing with two debts—principal and interest—and the form of the order is changed. The debenture-holders own both principal and interest, and each of them still has the right to appropriate. At all events, the money does not represent interest only, but must be applied pro ratâ.

Cur. adv. vult.

Feb. 12. BYRNE J., after stating the facts substantially as above, continued:—It is contended on behalf of certain of the debenture-holders that, there having been no attribution of these past payments to capital or to interest or otherwise than

(1) (1890) 24 Q. B. D. 548, 554.

as payments on account generally of the amount due, they are entitled to elect now to treat all such payments, and also any future payments, as being payments on account of principal, in which case there is no income tax payable. On behalf of the plaintiffs, as representing the general body of debenture-holders, it is argued that the past payments ought, in the most hostile aspect, to be treated as having been made rateably on account of principal and interest from time to time due, that these have been finally made, and that, if by error or from oversight, income tax which has not been ought first to have been deducted from so much of the payments as represents the rateable proportion attributable to interest, things must stand as they are; and that it is now competent for the cestuis que trust under the deed to say, "We now elect to receive further payments as and for capital." This injures no one; the mortgagors cannot be injured, and if by some chance further assets should be discovered and come in, this method of dealing with the fund cannot be worse, and may be better, for the mortgagors. For the Inland Revenue the argument, shortly, is that the payments were on account generally, and that means on account of principal and interest subject to adjustment at a future date; when adjusted, if it appears that payments have been made on account of interest, income tax ought to be answered out of any balance of trust funds, because the Court will, so long as trust property remains to be distributed, take care that any adjustment shall be so made as to make good any payments which ought properly to have been made had circumstances allowed them to have been made from time to time as and when they ought to have been; and, further, that the deed having provided for payment first of interest, and a judgment having been given for execution of the trusts, every payment must be treated, in the absence of other directions, as having been made in accordance with the terms of the trust. The trustees, the society, are only concerned in seeing that they are indemnified against any possible claims against them personally on behalf of the Inland Revenue authorities. Having considered the various orders made, I have satisfied myself that, in ordering payment on account of

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what was due generally, there was no intention to alter or affect the rights of any of the parties, and that, in effect, the matter stands before me in the same position in regard to the rights as between mortgagors and mortgagees as though I had now to deal with the whole fund for distribution, subject only to this—that I have no jurisdiction in this action to direct repayment of anything which has already been paid. To further clear the ground, I will next express my opinion that I cannot accept the argument that I must treat the payments already made as having been made rateably on account of principal and interest. The Court has not directed that they should be so made, either directly or by implication, but simply that they should be made on account generally of what was due. Exactly why the orders were so made I am unable to say with certainty; but there is no difficulty in understanding that there were sufficient reasons, and it is enough to point out that there was no certificate of what was due for principal and interest brought up to date; it was quite possible, so far as appears, that there would ultimately be realized enough to pay principal and interest, in which case no question would ever arise, and it might have been thought reasonable to give time to ascertain whether or not the mortgaged property would prove sufficient or insufficient, so that, if there were any option to take as for principal or interest, time might be given to raise the question of right to elect. I am unable to accept the argument grounded in general terms on the doctrine approved in *Cory Brothers & Co.* v. *Owners of the Turkish Steamship Mecca* (1) as to the right of appropriation of any payment on the part of the creditor to the last moment, where the debtor has not in making the payment himself appropriated its destination. This is a doctrine applicable as between debtor and creditor in the absence of express contract; but in the present case there was an express contract that moneys realized should be applied in a particular way—namely, in payment, first, of interest and then of principal. Nor can I say that the trust ceased to be effective ipso facto because the estate has turned out insufficient. I agree with Mr. Vaughan Hawkins's argument on this point.

(1) [1897] A. C. 286.

But I accept this view, which was presented to me on behalf of the plaintiffs—namely, that the provision in the deed for payment of interest first is one inserted obviously for the benefit of the creditors, and one, therefore, which they could waive if they so desired in the absence of opposition by the debtors, who in the present case do not oppose, nor is it conceivable that they could have any reason for opposing. It has been argued that it is impossible to permit any choice or right of election to appropriate to the creditors, because many of the debenture-holders may be trustees and would have to distribute amongst their own cestuis que trust, having regard to the quality of payments made to themselves whether as for principal or for interest. I will not pretend that the case is otherwise than complicated and difficult, but, having fully considered it, the matter presents itself to me in this way. As between the defendant society and the company it is matter of absolute indifference to the mortgagors how the proceeds of realization are disposed of, as they have nothing coming to them in any event. If they had any conceivable interest in the matter, it would, of course, be in favour of the application of the moneys in payment of capital first, contrary to the terms of the deed. As between the society holding the proceeds of realization and their cestuis que trust, the debenture-holders, the provision may, as I conceive, be waived by the cestuis que trust. How the moneys ought to be dealt with when received by the debenture-holders is a question if they are trustees between them and their cestuis que trust. Moreover, the Court is not executing any trusts as between the last-named parties. But this being an action for the common benefit of a number of creditors standing as between themselves pari passu as to their rights, no one or more of them could elect to receive moneys contrary to the terms of the deed to the detriment of any other of them. It cannot, however, be to the detriment of any of them that any other or others of them should receive payment as for principal instead of as for interest, because, on working out the account, any such payment must be in favour of those who desire to be paid strictly in accordance with the

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deed. The society have nothing to do with the question whether or not their cestuis que trust are trustees or not for others; they pay to the persons entitled under the deed, in accordance with the trusts of it, or otherwise, at the option of their payees, unless this could work injustice to others. I think the true solution of the matter, and one which will preserve all rights, is this. Let all payments heretofore made by the defendant society on account generally be attributed, at the option of the payees as between themselves and the defendant society at their election, as payments on account of principal or of interest, all such sums to be deemed to be so attributed without prejudice to any question whether or not such payments, or any part or parts thereof, are in the hands of the payees to be treated as capital or interest. In case any of the debenture-holders payees shall elect to have the payments to them made, in accordance with the deed, in discharge of interest first and then of principal, an account will have to be taken having regard to the election of such of the debenture-holders as shall have elected in favour of past receipts being treated as capital, so to take of what remains due to the debenture-holders, and let any balance now or hereafter to become distributable, subject to costs, charges, and proper deductions, be distributed accordingly. If, as I should apprehend would be the case, all the debenture-holders elect to take their past and future payments as for capital, there will probably be no occasion to take any account. The Inland Revenue will then, of course, look for payment from the debenture-holders of any income tax properly payable by them in respect of moneys, however paid to them, which in their hands are distributable as income. I imagine that, having regard to the considerable amounts already paid on account generally, if there be trustee debenture-holders, they must already have made payments for income from which they have deducted income tax. Of course, provision will have to be made for payment of income tax upon so much, if anything, as is paid to debenture-holders as for interest. I have not referred in detail to the authorities cited because I do not think that any of them really touch the actual point I have to

decide. If anything that has been paid was in fact interest, income tax ought to have been or to be provided for; but, in the view I take, none of it was definitely paid as interest. The order will require settling carefully, but I think I have sufficiently stated the principle on which it must be framed.

The minutes of the order as finally settled were as follows :—

"The Court declares that all payments heretofore made by the applicants to the holders of debentures of the 'C' series in the defendant company 'on account generally' of what was due thereon ought to be attributed, at the option of the holders of the said debentures as between themselves and the applicants, as payments on account of principal or of interest, and no income tax is payable in respect of so much thereof as is attributed to capital; but this declaration is without prejudice to the question whether or not such payments or any part or parts thereof ought, in the hands of the persons to whom payments have been made, to be treated as capital or interest. And in case any of the holders of the said debentures shall elect to treat the said payments heretofore made 'on account generally' of what was due on the said debentures as having been made in discharge first of interest then due and as to the balance in discharge of capital, let an account be taken to ascertain how much out of the amounts paid 'on account generally' as aforesaid ought, in accordance with such election, to be treated as having been paid in respect of interest, and how much in respect of capital; and out of any moneys now or hereafter to become distributable in respect of the said debentures whose holders should have so elected, let the applicants first pay the income tax payable in respect of the amounts found to have been paid in respect of interest as aforesaid. And it is ordered that subject as aforesaid any moneys now or hereafter to become distributable amongst the holders of the said debentures of the 'C' series in the defendant company may be paid, at the option of the holders of the debentures as between themselves and the applicants, on account of principal or of interest, but so that (inclusive of payments already made on account of principal) no more than 20s. in the pound be paid on account of principal secured by any of the said debentures; and income tax is to be paid on such part thereof (if any) as shall be payable on account of interest."

Solicitors: *Gribble, Oddie, Sinclair & Johnson; W. H. Smith & Son; Bennett & Chance; Solicitor of Inland Revenue.*

H. C. R.

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J. B. BROOKS & CO., LIMITED *v.* LYCETT'S SADDLE AND MOTOR ACCESSORY COMPANY, LIMITED.

[1903 J. 859.]

Patent—Pending Action for Infringement—Amendment of Specification without Leave of Court—Subsequent Action on amended Specification—Invalidity of Amendment—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 18, *sub-ss.* 1, 9, 10; *s.* 19— *Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 5.

Sects. 18 and 19 of the Patents, &c., Act, 1883, which relate to the amendment of a specification, must be read together. Sect. 18 states what an applicant may do before litigation, and s. 19 states what he may do whilst in litigation; and if an applicant, whilst litigation is pending and without leave of the Court under s. 19, amends his specification under s. 18 by leave of the comptroller, the amendment is irregular and void notwithstanding sub-s. 9 of s. 18.

Sub-s. 10 of s. 18 is not limited to litigation pending between the same parties at the time when the application to amend is made, but refers to any action for infringement or petition for revocation pending at that time in relation to the patent.

THIS was an action for the infringement of letters patent No. 15,424 of the year 1890, and of letters patent No. 8553* of the year 1893, granted to J. B. Brooks for inventions for "Improvements in velocipede saddles." The plaintiffs by their statement of claim alleged that the final specification of letters patent No. 8553* of 1893 was duly amended on May 9, 1901, and that the original claims of the said specification before amendment were framed in good faith and with reasonable skill and knowledge; and they claimed an injunction and the usual ancillary relief.

The defendants raised the usual defences, and in particular they objected that the specification of the patent No. 8553* of 1893 was not duly or at all amended, and that the proceedings in relation thereto were irregular and without authority, upon the ground that, at the date on which the patentee's request for leave to make the amendment of the final specification was left at the Patent Office, there was an action for infringement of the said patent pending in the High Court, namely, *J. B.*

Brooks & Co., Ld. v. *E. Lycett* [1897 J. 651], and the patentee did not obtain from the Court or a judge liberty to apply at the Patent Office for leave to amend. The plaintiffs in reply relied on sub-s. 9 of s. 18 of the Patents, &c., Act, 1883.

The facts with respect to the action [1897 J. 651] were as follows. The present plaintiffs commenced that action in April, 1897, against E. Lycett for infringement of their letters patent No. 15,424 of 1890 and No. 8553 of 1893. Pleadings were delivered and notice of trial was given, and on the action coming on for trial in November, 1898, negotiations commenced for a compromise, and by consent the action was withdrawn from the list and stood over generally with liberty to either party to restore. In August, 1899, the negotiations fell through, and the parties were again at arm's length, but they allowed the action to sleep. In February, 1901, the plaintiffs, as if the action of [1897 J. 651] had been discontinued, applied to the comptroller under s. 18 of the Act for leave to amend the specification of the patent No. 8553 of 1893. The usual advertisements were made, and on May 9, 1901, the comptroller made the usual order giving leave to amend. Notice of these proceedings did not come to the defendant E. Lycett until some time afterwards, and in February, 1902, he applied to the Court for leave to restore the action [1897 J. 651] to the list. The application was opposed by the plaintiffs; but the Court held that that action was a lis pendens and must be restored. Subsequently leave was given to the plaintiffs to discontinue it, each party paying their own costs: see *J. B. Brooks & Co., Ld.* v. *Lycett.* (1)

In May, 1903, the plaintiffs commenced the present action against the defendant company and the said E. Lycett, who was the managing director of the defendant company, on the amended specification as above stated.

A. J. Walter and *J. H. Gray*, for the plaintiffs.

Bousfield, K.C., and *J. W. Gordon*, for the defendant company. The plaintiffs cannot maintain this action on their amended specification because the amendment is void: sub-s. 10

(1) (1902) 19 Rep. Pat. Cas. 166.

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of s. 18 of the Act. (1) The action [1897 J. 651] (2) was pending when they made their application, and they ought to have applied to the Court for leave under s. 19 of the Act: *Woolfe* v. *Automatic Picture Gallery, Ld.* (3) Notice of the application ought also to have been given to us. Therefore the comptroller had no jurisdiction to entertain the application, and the patent before the Court is the original unamended specification.

The defendant E. Lycett in person.

A. J. Walter. There was no pending litigation within the meaning of the Act at the time when the application to amend was made: *Cropper* v. *Smith.* (4) The plaintiffs acted in good faith, and in the belief that the action of [1897 J. 651] had come to an end. Sub-s. 10 means effective active litigation pending, and not an action that by tacit agreement between the parties has been dropped and allowed to go to sleep. By sub-s. 9 the order of the comptroller is conclusive, and the Court will not go behind it: *Farbenfabriken vorm. Fr. Bayer*

(1) The Patents, &c., Act, 1883, enacts:—

Sect. 18, sub-s. 1: "An applicant or a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same."

Sub-ss. 2 to 8 inclusive provide for the advertisement of the application, notice of opposition, the hearing of the applicant and the opposer, and the determination whether and subject to what conditions (if any) the amendment ought to be allowed.

Sub-s. 9: "Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall in all Courts and for all purposes be deemed to form part of the specification."

Sub-s. 10 (as amended by s. 5 of the Act of 1888): "The foregoing provisions of this section do not apply when, and so long as any action for infringement or proceeding for revocation of a patent is pending."

Sect. 19: "In an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a judge may impose, be at liberty to apply to the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

(2) 19 Rep. Pat. Cas. 166.

(3) [1903] 1 Ch. 18.

(4) (1884) 28 Ch. D. 148, 151.

& Co. v. *Bowker*. (1) Further, sub-s. 10, read with s. 19, points to active proceedings pending between the same parties when the application to amend is made, and does not apply to an action brought after the amendment against other parties. We admit we cannot maintain the action on the unamended specification, and, if the Court is against us on this point, we now ask for leave to amend.

FARWELL J. I do not see my way to depart from the plain words of the Act of Parliament. Sub-s. 10 of s. 18 of the Act says that the foregoing provisions of the section shall not apply so long as "any" action for infringement is pending. Now in this case litigation was pending at the time when the application to amend the specification was made. The facts were shortly these. A writ was issued by the present plaintiff against Lycett, the individual, on April 8, 1897. Pleadings were delivered, notice of trial was given, and at the trial of the action in November, 1898, the parties began to negotiate with a view to a settlement. Accordingly, on an application made to the judge, the case by consent was taken out of the paper and stood over generally, with liberty to either party to apply to restore. In January, 1899, an agreement was entered into between the parties for the settlement of their differences; but, unfortunately, for reasons which I need not go into, it was cancelled by mutual arrangement in August, 1899. So that in August, 1899, the parties were again at arm's length. No further step, however, was taken in the action, and the parties appear to have let it sleep. In February, 1901, the present plaintiffs applied to the comptroller under s. 18 of the Act for leave to amend the specification of their patent No. 8553 of 1893, and an order was made on May 9, 1901. On February 8, 1902, the present defendant Lycett, the individual, applied, under the liberty to restore, to have the action restored to the list. The application came on before Joyce J., and is reported. (2) The head-note is this: "Where an action set down in the list for trial has been dropped by tacit agreement

(1) (1891) 8 Rep. Pat. Cas. 389, 396.

(2) 19 Rep. Pat. Cas. 166.

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between the parties without any special or express stipulation, and without any provision in the event (which happened) of the agreement for the settlement of their differences subsequently going off:—*Held*, first, on the motion of the defendant, that the action should be restored to the list; that it was a lis pendens, and could be restored: but, secondly, on the motion of the plaintiffs for leave to discontinue, that owing to the tacit agreement the plaintiffs were entitled to discontinue it, if they chose to do so, each party to bear their own costs." Now that is a decision of the learned judge, and I consider that it binds me, that the action was a lis pendens which required an actual application for leave to discontinue before it came to an end. The result is that that action was an action pending within the 10th sub-section of s. 18 when the plaintiffs applied to the comptroller for leave to amend. Then it is said that this 10th sub-section only applies to an action pending between the same parties; but I cannot see my way to hold that. It is quite true that there are words in s. 19 which suggest that view, because it is difficult to see what the defendants in the present action have got to do with the application and the leave to amend being obtained from the comptroller by the plaintiffs in the old action. But, however that may be, I do not feel at liberty to limit the very general words of sub-s. 10, which are: "So long as any action for infringement of a patent is pending." The Court of Appeal in *Woolfe* v. *Automatic Picture Gallery, Ld.* (1) have no doubt put some limitation on the words in order to make the sections work; but the judgment for the present purpose is really summed up by Cozens-Hardy L.J. He says (2): "It seems to me that s. 18, which must be read with s. 19, states what a patentee may do before he is in litigation, and s. 19 states what he may do while he is in litigation." I respectfully agree that that is the true meaning. In that case an application was made for leave to amend before any proceeding was taken for revocation of the patent, and the Court held that the subsequent petition for revocation did not affect the prior application for

(1) [1903] 1 Ch. 18. (2) [1903] 1 Ch. 26.

leave to amend; so that s. 18 did apply notwithstanding the subsequent litigation. The case of *Farbenfabriken vorm. Fr. Bayer & Co.* v. *Bowker* (1), on which Mr. Walter relied, at first sight seemed to be in point; but when the facts and dates are looked at it is exactly the same case as *Woolfe* v. *Automatic Picture Gallery, Ld.* (2), because there also the application for leave to amend was made before the litigation commenced. The result is that I do not see my way to hold that this amendment can be deemed regular and proper. I can only treat the patent as unamended; but, under the circumstances, I assent to Mr. Walter's application that the action may stand over, with liberty to the plaintiffs to apply to amend their specification, and I reserve all questions of costs and terms.

Solicitors: *Sharpe, Parker & Co; Beale & Co.*

(1) 8 Rep. Pat. Cas. 389. (2) [1903] 1 Ch. 18.

H. L. F.

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Nov. 5.

In re LOVERIDGE. PEARCE *v.* MARSH.

[1901 L. 712.]

Mortgage—Freeholds—Mortgagee in Possession—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 7—*Devolution of Mortgaged Estate—Realty or Personalty.*

L. was the mortgagee in fee of land of which he took possession in 1861. He remained in possession till his death in 1864. By his will he made his widow executrix and tenant for life, and subject thereto died intestate, leaving I. his heir. The widow and I. were entitled to L.'s personalty.

On L.'s death his widow took possession, which she retained until her death in 1900.

Buckley J. held that although the land descended to I. as heir, he held it as trustee for the widow who was entitled to the mortgage debt as executrix; that I. was not discharged from the trusteeship when the mortgagor was statute-barred; and that the land devolved on the executrix of L. as personalty: *In re Loveridge, Drayton* v. *Loveridge*, [1902] 2 Ch. 859.

I. died in 1880, having been of unsound mind ever since the death of L. He died intestate, and P. was his administrator and A. and X. were his co-heiresses.

Held, by Buckley J., (1.) that the mortgagor was statute-barred on January 1, 1879, when s. 7 of the Real Property Limitation Act, 1874, came into force; (2.) that the one-half share of the land in which I. was beneficially interested vested in him as realty and descended on his death to his co-heiresses.

James Loveridge was in 1861 entitled to a mortgage debt of 1075*l.* secured upon freehold messuages and land by a mortgage in the form of a trust for sale dated May 26, 1831, and in that year (1861) went into possession of the mortgaged hereditaments. He remained in possession until his death on December 28, 1864, without having accounted or made any acknowledgment to the mortgagor.

By his will he had devised and bequeathed his residuary real and personal estate to his wife during widowhood, subject to certain annuities; and subject as aforesaid he died intestate. He appointed his wife executrix, and she proved the will in 1865.

On his death his widow went into possession, and retained possession until her death on February 15, 1900, and she never accounted or made any acknowledgment to the mortgagor, and never married again. She was therefore tenant for life from 1864 to 1900.

The testator left no children, and at his death the persons entitled to his personalty under the Statute of Distributions were his widow and his brother Isaac Loveridge, who was also his heir-at-law.

Isaac Loveridge died intestate on August 20, 1880, Mrs. Pearce being his administratrix and Mrs. Arnopp and Mrs. Ames his co-heiresses. Mrs. Drayton was executrix of the testator's widow and legal personal representative of the testator. In an action, brought by her, of *In re Loveridge, Drayton* v. *Loveridge* [1900 L. 664], an administration order was made on May 7, and the master by his certificate filed April 22, 1902, reserved the question whether the mortgage debt and the land comprised in the mortgage remained of the nature of personalty, or whether the possession of the mortgaged property was to be treated as making it realty.

This question was argued before Buckley J., who, on August 2, 1902, held that although the estate descended to the testator's heir, Isaac, he was only a trustee for the testator's legal personal representative, and that, on the equity of redemption becoming subsequently barred, the heir remained trustee for the legal personal representative as the owner of the debt, and the land belonged to the legal personal representative as personalty: *In re Loveridge, Drayton* v. *Loveridge.* (1)

The present action was brought for the administration of the estate of Isaac Loveridge, and under an order dated May 1, 1901, directing inquiries, the master, by his certificate dated April 4, 1903, found that at the testator's death Isaac became entitled to one moiety of the reversionary interest in the mortgaged property as personalty under the Statute of Distributions; that on January 1, 1879 (when the Real Property Limitation Act, 1874, came into force), the mortgagor's interest became barred by the Act of 1874; and that Isaac was of unsound

(1) [1902] 2 Ch. 859.

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mind from the date of the testator's death until his own death. He accordingly submitted for the determination of the Court the question whether the moiety of the mortgaged property to which Isaac was entitled became on January 1, 1879, real estate and belonged to his heiresses, or whether it remained personalty and belonged to his next of kin.

Astbury, K.C., and *H. C. Hawkins*, for Mrs. Pearce. The Court has already held that the land devolved upon the testator's legal personal representation as personalty: *In re Loveridge, Drayton* v. *Loveridge*. (1) No statutory period of limitation had run prior to January 1, 1879, and up to that time the land remained personalty as a mere security for a debt. Isaac, being of unsound mind from the date of James's death until his own death, there was no election by him as to whether it should be taken as realty or personalty. He held, therefore, throughout as trustee for the owner of the mortgage—namely, James's legal personal representative—and the mode in which he had to carry out the trust was pointed out in the mortgage itself. If Isaac had died before 1879 the property would in equity have been personalty. On January 1, 1879, the mortgagor was barred, but Isaac did nothing to change the property into a freehold—some one else, the widow, did—by remaining in possession; but that could not affect the nature of the property as regarded Isaac's moiety. He still remained legal owner in fee, but subject to a trust for sale which was unaffected by the fact that the mortgagor's title was barred: *In re Alison*. (2) The widow might at any time have required the trust to be carried into effect by sale. The interest of Isaac, therefore, always remained personalty and now belongs to his next of kin.

J. M. Stone, for another person in the same interest. I adopt the argument already addressed to the Court. The property being in equity personalty, some act on behalf of the mortgagee was required to convert it into realty. Because the equity of redemption is barred, it does not follow that the mortgagee's right to sue for his debt is barred—for the

(1) [1902] 2 Ch. 859. (2) (1879) 11 Ch. D. 284, 295.

mortgagor might have given an acknowledgment within the statutory period—and if the mortgagor sued for his debt he would have to restore the mortgaged property. If the mortgagee in possession for the statutory period does not shew his election to take the property as realty, it remains personalty: *Attorney-General* v. *Vigor*. (1)

Peterson, for another person in the same interest. The finding in the master's certificate that the mortgagor was barred is an inference of law only, which is not binding on the Court. On the face of the certificate it is manifest that the inference is incorrect. The mortgagee was not in possession for the period prescribed by s. 7 of the Act of 1874, for Isaac was the mortgagee. He never entered into possession, and if the widow, the owner of the mortgage debt, was in possession, it was not as Isaac's agent. He could not appoint an agent. The mortgagor, therefore, never was statute-barred, and the property is still personalty.

Vaughan Hawkins and *Fossett Lock*, for the co-heiresses. The finding as to law in the certificate is binding. Assuming that is not so, the mortgagor's rights are plainly barred by the statute, and the co-heiresses are entitled to Isaac's moiety.

The mortgage is in the form of a trust for sale, but that is only equivalent to a power of sale, and its existence makes no difference.

The words of s. 7 of the Act of 1874 are sufficient to shew that the mortgagor is barred. The section says: "When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage," the mortgagor shall not bring any action to redeem, "but within twelve years next after the time at which the mortgagee obtained such possession or receipt," unless in the meantime there is an acknowledgment in writing of the mortgagor's title, "signed by the mortgagee or the person claiming through him." James was the mortgagee and obtained possession of the land, and neither he nor any one else gave an acknowledgment. Therefore, at the end of twelve years, or rather on January 1, 1879, the mortgagor was barred. The bar effected a statutory conveyance, and caused the

(1) (1803) 8 Ves. 256, 277.

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mortgagor's title, not his mere remedy, to disappear: *Doe* v. *Sumner*. (1)

There was no need for election. The mortgaged property became realty, and it is immaterial that the persons entitled to the whole interest in the land were previously entitled to the whole of the mortgage money. It is immaterial that the persons entitled to the money might have sued for the debt. They never did sue, and the fact that they could do so did not cause the mortgaged property to remain personalty.

Astbury, K.C., in reply.

BUCKLEY J. I will deal first with the argument of Mr. Peterson that I am not bound by the conclusion of law in the master's certificate, and that the mortgagor's title is not statute-barred. I think his contention that I am not bound by the conclusion of law is right, but I do not agree with him that the mortgagor's right is not barred. In 1861 James Loveridge was the mortgagee, and obtained possession of the mortgaged property. More than twelve years had elapsed on January 1, 1879, the day fixed by the Real Property Limitation Act, 1874, for the coming into operation of that Act, by which the period of limitation was shortened to twelve years, and in my judgment the mortgagor's right to redeem the property was barred on January 1, 1879.

I come next to the point raised by Mr. Stone. He says that, assuming the mortgagor's right to redeem is barred, it does not follow that the debt is statute-barred, and that the mortgagee may sue to recover the amount. I will assume that to be so, and that the mortgagee would by suing do something equivalent to re-opening the foreclosure. The argument must amount to this—that in every case, whether it is foreclosure or bar, because something might have been done whereby the foreclosure or the mortgagor's right was opened or revived, and the mortgaged property might thus have become a mere security for the mortgage debt, therefore the mortgagee must be shewn to have in some way elected to take the land as land. The answer is that nothing has been done to open the foreclosure or revive any right of the mortgagor.

(1) (1845) 14 M. & W. 39, 42.

On January 1, 1879, the legal estate in the mortgaged property was in Isaac, the heir-at-law of James Loveridge, and, the mortgagor's rights being barred, the persons beneficially entitled were James's widow, during her life, and the widow and Isaac equally in moieties after her death. As from the time when the rights of the mortgagor were barred, the rights of these two persons claiming under the mortgagee, which theretofore had been to have payment of the money and to hold the land as security, were enlarged. There was no longer any debt with security against the land, but the same persons were entitled to both the land and the security. They could not have security against land of their own. Their right, therefore, was to the land. In such a case no election is required. Without any election what was previously personalty became realty. If Isaac had been the only person interested, the matter would have been unarguable, as the statute effected a statutory conveyance of the land. It makes no difference that the parties interested are two. The estate so enlarged was held by Isaac in trust for the widow and himself. Does it make any difference that the mortgage was by way of trust for sale? Mr. Vaughan Hawkins considered that whether this was or was not the fact was immaterial, and assumed it to be the fact. The only object of the trust, if it existed, was to give effect to the mortgagee's right by way of security; and if there is no longer any security the trust is gone.

Then, is any election necessary? The mortgagee took his estate, not by election, but by the operation of the Act.

In my judgment, Isaac, as from January 1, 1879, became entitled to his moiety of the property as realty, and that moiety descended to his heiresses as real estate.

Solicitors for plaintiff and heiresses: *Bridgman & Willcocks, for Hillman & Bond, Lyme Regis.*

Solicitors for next of kin: *Baillie & Co., for Sir R. N. Howard, Weymouth; and Geare & Pease, for W. Forward & Sons, Axminster.*

F. E.

BUCKLEY J.

1903

Dec. 9, 10.

CAVENDISH *v.* STRUTT.

[1902 C. 545.]

Practice—Costs—Taxation—Refresher Fees—Discretion of Taxing Master—Party and Party Costs—Rules of the Supreme Court, Order LXV., *r.* 8; *r.* 27, *sub-rr.* 29, 48.

Under rule 10 of January, 1902, of Order LXV. (which is the new sub-rule 29 of rule 27 of the same order) the discretion of the taxing master to allow refresher fees is no longer limited, in taxations as between party and party, to the maximum fees prescribed by Order LXV., r. 27, sub-r. 48; and he may allow such fees as shall appear to him to be necessary or proper for the attainment of justice or for defending the rights of any party.

SUMMONS to review taxation.

The action of *Cavendish* v. *Strutt* was brought to set aside a deed of voluntary settlement. The trial lasted for twenty-one days before Byrne J., and judgment was reserved. On May 14, 1903, Byrne J. delivered judgment setting aside the deed, and ordered the defendants to pay the plaintiff's costs. The plaintiff carried in his bill for taxation, amounting to 3638*l.* 15*s.* 4*d.* On August 12 the taxing master issued his certificate for 1920*l.* 10*s.* 3*d.* The plaintiff carried in objections to the disallowance of (1.) the costs of certain negotiations which had taken place between the parties; (2.) the disallowance of copies of some affidavits; (3.) the reduction and disallowance of the refresher fees to counsel from fifty guineas to ten guineas, from thirty guineas to seven guineas, and from twenty guineas to five guineas.

The taxing master disallowed these objections, and on the third item he said in his answer to objections that if he had the power to increase the refresher fees he would certainly do so, having regard to the magnitude of the case and the smallness of the fees marked on the briefs. But he thought that he was bound in a party and party taxation by the Rules of the Supreme Court, Order LXV., r. 27, sub-r. 48, and was limited to the maximum refresher fees there prescribed. He also stated that the taxing masters were of opinion that the Rules

of the Supreme Court, Order LXV., r. 27, sub-r. 29, did not enlarge their power in this respect.

The plaintiff took out a summons to review the taxation.

The first two objections were not pressed.

Buckmaster, K.C., and *Mark Romer*, for the plaintiff. The main question is whether, on a taxation of costs as between party and party, the taxing master has a discretion to allow a refresher fee to counsel greater than the maximum refresher fee allowed by Order LXV., r. 27, sub-r. 48. That rule provides that refresher fees "from" so much "to" so much may be allowed, and contains no negative words. The proviso now at the end of the rule was added in 1886, and enabled larger fees to be allowed in solicitor and client taxations under special circumstances.

By rule 10 of January, 1902, which is now Order LXV., r. 27, sub-r. 29, it was provided as follows: "On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses." The defendants will no doubt contend that that rule does not give discretion in case of refresher fees as between party and party.

It is submitted that that is not the true meaning of the new rule, but that it is of general application, and applies to refreshers in party and party taxations. The new rule was referred to in *In re Bradshaw*. (1)

Order LXV., r. 8, provides that solicitors shall be allowed in certain cases the fees set forth in Appendix N, and that "no higher fees shall be allowed in any case, except such as are by this order otherwise provided for." The words of that rule are much stronger than those of rule 27, sub-rule 48; yet it was

(1) [1902] 1 Ch. 436, 450.

BUCKLEY J. 1903 CAVENDISH v. STRUTT.

held that the effect of rule 27, sub-rule 29, was to give the taxing master discretion to allow larger sums to witnesses than the maximum sums allowed by Appendix N: *McIver & Co., Ld.* v. *Tate Steamers, Ld.* (1) That decision of the Court of Appeal was followed by Farwell J. in *In re Ermen.* (2)

The very point now before the Court was recently decided by Kennedy J., who held that rule 27, sub-rule 29, gave a discretion to allow refresher fees, in a party and party taxation, exceeding the maxima fixed by rule 27, sub-rule 48: *Stewart & Co.* v. *Weber.* (3)

Sargant, for the defendants. Order LXV., r. 27, sub-r. 29, has not enlarged the power of taxing masters to allow refresher fees to counsel beyond a fixed amount in party and party taxations. I admit that *Stewart & Co.* v. *Weber* (3) is in point and is a decision adverse to me; but that decision is wrong, as I submit, for reasons not put forward before Kennedy J. Rule 27, sub-rule 29, leaves rule 27, sub-rule 48, unaltered. Rule 27, sub-rule 48, proceeds on the principle that the proper mode of payment is by time, and it allows very small variations. The proviso was added in 1886, and allowed special fees to counsel under special circumstances in taxations as between solicitor and client. Refresher fees are special fees, if larger than the maxima allowed by rule 27, sub-rule 48, and the reason for adding the proviso was that in *In re Harrison* (4) it had been held that unless there was express authority by the client the taxing master could not, in a solicitor and client taxation, allow larger refreshers than the maxima under rule 27, sub-rule 48, as originally framed. The exception made was confined to taxations as between solicitor and client, and even then only allowed under special circumstances.

Now the Rules of Court have the effect of a statute, and when the Court has to consider whether a new rule in general terms has repealed or altered or extended an old rule, the principles of construction applicable to statutes must be regarded. "If anything be certain it is this, that where there are general words in a later Act capable of reasonable

(1) [1902] 2 K. B. 184.
(2) [1903] 2 Ch. 156.
(3) (1903) 19 Times L. R. 722.
(4) (1886) 33 Ch. D. 52.

and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so": *Seward* v. *The Vera Cruz.* (1)

Rule 8 is a general rule dealing with all kinds of costs, and is distinct from rule 27, sub-rule 48, which refers only to refresher fees. Rule 27, sub-rule 29, was then made, and that again deals with all kinds of costs generally. That is subsequent legislation of a general character, and ought not to be applied to previous specific legislation so as to abrogate it altogether. The Court will not apply sub-rule 29 in such a way as to put an end to the operation of sub-rule 48. The form of sub-rule 29 shews that that result was not intended. The language is inappropriate to the allowance of refresher fees exceeding a maximum. It cannot be "necessary" in any case to employ any particular counsel at special fees. If sub-rule 29 applies at all to this question, it must altogether do away with sub-rule 48.

In re Ermen (2) was a question on taxation between solicitor and client, and decided on the ground that sub-rule 29 was within the exception "except such as are by this order otherwise provided for" to rule 8; and that it therefore must be read into rule 8. That does not shew that the limit of Appendix N is taken out of rule 8. Farwell J. did not deal with the question whether rule 8 was enlarged by sub-rule 29.

Assuming that sub-rule 29 applies to refresher fees in party and party taxations—though I contend that it does not—it leaves them as they were before. There is in sub-rule 48 a general provision against allowing refresher fees beyond a fixed maximum, and a proviso was added to that sub-rule giving a discretion in the case of solicitor and client costs. Sub-rule 29 is just the opposite: it is affirmative in its general terms, and negative in its exception. The proviso to sub-rule 48 leaves the old rule in force in respect of party and party costs. Then sub-rule 29 saves a person who has to pay party and party costs

(1) (1884) 10 App. Cas. 59, 68. (2) [1903] 2 Ch. 156.

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from payment of special fees such as these. The exception in sub-rule 29 accurately describes fees which exceed the fixed maximum of sub-rule 48. The plaintiff's construction gives a meaning to both rules without abolishing sub-rule 48.

[No reply was called for.]

BUCKLEY J. In this action Byrne J., on May 14, 1903, ordered the defendants to pay to the plaintiff Cavendish the costs of this action up to judgment, to be taxed by the taxing master. The plaintiff carried in his costs for taxation. They have been taxed, and the summons asks that the plaintiff's objections to that taxation may be allowed, and that it may be referred back to the taxing master to vary his certificate accordingly. The objections were three in number. One of them Mr. Buckmaster did not open; it was only for a small amount. The second objection he agreed that he could not argue, as the taxing master had exercised his discretion upon it. The only one argued before me was the third. It is no doubt of importance. The question I have to decide is whether on a taxation of costs between party and party the taxing master has, under the rules as they now stand, a discretion to allow a refresher fee to counsel in excess of the maximum refresher fee allowed by Order LXV., r. 27, sub-r. 48. The language of sub-rule 48 is that "the taxing officer may allow" fees of certain amounts, from one sum named to another sum named. The rule contains no negative words. It does not provide that the taxing officer shall not allow more than those amounts, but on the true construction of the sub-rule I think that is its effect, and in *In re Harrison* (1) Cotton L.J., after expressing some doubt on the subject, said that the sub-rule must be read as restricting the fees. That case was decided before the proviso now at the end of the sub-rule was added. The proviso is as follows: "Provided that in the taxation of costs between solicitor and client the taxing officer shall be at liberty to allow larger fees, under special circumstances to be stated by him." The addition of that proviso no doubt supports further the construction previously adopted by

(1) 33 Ch. D. 52, 69.

Cotton L.J. as to taxations between party and party. The history of the proviso is as follows. In *In re Harrison* (1) the question was raised whether on a taxation between solicitor and client, when the client had given his solicitor authority to employ a particular leader, and to give him a refresher fee larger than the maximum fee allowed by sub-rule 48, the limit of that sub-rule applied, with the result that the taxing officer was precluded from allowing more than the maximum fee. The Court of Appeal held that it did apply, although it could be displaced by special agreement. The proviso was then introduced in order to give the taxing master a discretion in the case of solicitor and client costs. The discretion thus given was not extended to party and party costs. Therefore I start with this, that sub-rule 48 is to be read as if it provided that in a party and party taxation the taxing officer may allow, by way of refresher fee, so much and no more. The question then arises whether the new rule 10 of January, 1902, which is now Order LXV., r. 27, sub-r. 29, has given the taxing master a further discretion, namely, a discretion to go beyond the limits of sub-rule 48 in taxations between party and party. Sub-rule 29 is as follows: "On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses." In my opinion this has given him a further discretion. It has been decided by the Court of Appeal in *McIver & Co., Ld.* v. *Tate Steamers, Ld.* (2) that where the case is one to which Order LXV., r. 8, applies the taxing master has a discretion to make an allowance in respect of a solicitor's attendance in excess of the maximum allowance for such attendance specified in Appendix N, No. 147. Rule 8 does, whereas sub-rule 48 does not, contain negative words. It says: "And

(1) 33 Ch. D. 52. (2) [1902] 2 K. B. 184.

BUCKLEY J. 1903 CAVENDISH v. STRUTT.

no higher fees shall be allowed in any case." These words are, it is true, controlled by an exception, "except such as are by this order otherwise provided for." The Court of Appeal, however, rested their decision, not on the words of exception, but on the conclusion at which they arrived that sub-rule 29 gives the master on every taxation a discretion to allow such costs as appear to him to be necessary or proper within the language of the sub-rule. Sub-rule 48 does not contain the words "and no higher fee shall be allowed," and therefore of course contains no words of exception; but, seeing that the Court of Appeal did not rest their decision on those words, the present case is not distinguishable from *McIver & Co., Ld.* v. *Tate Steamers, Ld.* (1)

In construing the rules I think I am bound to read them as a whole, with the result that sub-rule 29 qualifies sub-rule 48, and gives the taxing master a discretion with regard to allowing fees under sub-rule 48 which he did not previously possess. The old sub-rule 29 referred only to costs between party and party and was in a negative form. It said that "as to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper"; whereas the new sub-rule 29 refers to every case of taxation, and is in an affirmative form. The Rule Committee struck out the one rule and substituted the other. I am bound to hold that they did that deliberately with a view to adding to the power of the taxing master. The taxing master says that if this view is adopted it will tend to abolish the distinction between party and party and solicitor and client costs. I do not think so. Sub-rule 29 consists of two parts. The first sentence is general and applies to every taxation—"on every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." The second part applies only to taxation as between party and party, for by the words "save as against the party who incurred the same," it excepts a taxation as between solicitor and client. It says: "but save as against

(1) [1902] 2 K. B. 184.

the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses." The result is that in taxations between party and party there is created a new discretion in the taxing master limited by the language used in sub-rule 29. By that I mean that this limitation is imposed on him—that he must find that the higher amount which he allows is "necessary or proper for the attainment of justice or for defending the rights of any party." If the taxation is between solicitor and client he is not bound by that limitation. In that case he may allow costs incurred or increased by "payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses," which he is not to allow on taxations between party and party. The latter part of the sub-rule includes what is generally called a "special fee"—that is to say, a fee paid to counsel who will only go into Court on payment of a special fee in addition to the usual fees. But it is not limited to that. "Special fees" there mean unusual or extraordinary or generous fees.

Mr. Sargant, who argued the case with great ability, has pressed this argument upon me—that I ought to decide the question upon the principle that where there is a special rule referring to details, and then a rule is made on the same subject but of a general character, the general rule does not abrogate the special rule. He referred to *Seward* v. *The Vera Cruz* (1), where Lord Selborne says that, "where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." I do not think that is a principle to apply in this case. Into these rules are introduced from time to time alterations and variations, and I must take it that the

(1) 10 App. Cas. 59, 68.

BUCKLEY J. 1903 CAVENDISH v. STRUTT.

Committee in making the alterations are dealing with the rules as a whole. I have to make up my mind whether it was intended to qualify what was in the rules before the alteration or not. Here I think it was so intended.

Mr. Sargant also contended that, on the assumption that sub-rule 29 applied to sub-rule 48, nevertheless it left refresher fees as they were before, because sub-rule 48 gives a definite maximum, and sub-rule 29 says that on taxations between party and party special fees and other unusual expenses shall not be allowed. I have dealt with this already. The special fee there referred to is an unusual or extraordinary fee, and not a fee larger than that allowed by sub-rule 48, whose payment is necessary or proper within sub-rule 29. Sub-rule 29 empowers the master to go beyond sub-rule 48, for the purpose, not of allowing in party and party taxations refresher fees which are unusual or extraordinary, but of allowing such refresher fees as are "necessary or proper for the attainment of justice or for defending the rights of any party," notwithstanding that they are in excess of sub-rule 48.

In *In re Ermen* (1) Farwell J., and in *Stewart & Co.* v. *Weber* (2) Kennedy J., have decided this question in the same way as I have done. *Stewart & Co.* v. *Weber* (2) is on all fours with this case, and I might have followed it without adding anything; but, having regard to the importance of the question, I have thought it best to give my own reasons. I allow the objection, and send this case back to the master to decide what in his discretion are reasonable refresher fees to allow to the plaintiff's counsel. The plaintiff has succeeded on the more important of his objections, and the defendants must pay two-thirds of his costs of the present application.

Solicitors: *Charles Everett; Ranger, Burton & Frost.*

(1) [1903] 2 Ch. 156. (2) 19 Times L. R. 722.

H. C. R.

SWINFEN EADY J.

1904

Jan. 21; Feb. 2.

In re RISING.
RISING *v.* RISING.

[1903 R. 1876.]

Power—Testamentary Power—Excessive Execution—Cy-près.

A cy-près estate cannot be implied in lieu of excessive limitations of real estate under a testamentary power, unless it will include all persons intended to take under those limitations, and no others.

Monypenny v. *Dering*, (1852) 2 D. M. & G. 145, and *Hampton* v. *Holman*, (1877) 5 Ch. D. 183, followed.

ORIGINATING SUMMONS.

Under the will of William Rising the elder, and in the events that had happened, certain hereditaments stood limited to the use of Benjamin Rising for life, with remainder to the use of his children, or other issue born in his lifetime, for such estates and in such shares as he should by deed or will appoint, and in default of appointment to the use of his children in fee simple as tenants in common.

By his will dated December 6, 1890, Benjamin Rising appointed the hereditaments to his son William for life, with remainder to William's sons born during the testator's life successively according to seniority for life, with remainder after the decease of each such son to his sons successively according to seniority in tail male, with remainder to William's sons born after the testator's death successively according to seniority in tail male, with remainder to William's daughters successively according to seniority (1), with remainder after the death of each such daughter to her sons successively according to seniority in tail male, with remainder to the testator's daughter Ethel for life, with remainder to her sons successively according to seniority in tail male, with remainder to her daughters successively according to seniority (1), with remainder after the death of each such daughter to her sons successively according to seniority in tail male, with divers

(1) The words "for life" were omitted.

SWINFEN EADY J.

1904

RISING, *In re.* RISING *v.* RISING.

remainders to the testator's nieces and other strangers to the power, and an ultimate remainder to the testator's heirs.

The testator died on August 28, 1902, leaving two children, William and Ethel, both of age and married. William had no children. Ethel had one child, Cyril, born in the testator's lifetime, and still an infant.

As William's grandsons were not objects of the power, so that the appointment to them in tail male and all subsequent limitations failed on the strict construction of the will, this summons was issued to determine whether William took an estate tail cy-près.

Ashworth James, for the trustees of the will of William Rising the elder.

Dighton Pollock, for the son William. The testator's intention can be carried out cy-près by giving William an estate tail: Farwell on Powers, 2nd ed. p. 315; *Line* v. *Hall* (1); *Stackpoole* v. *Stackpoole*. (2)

The fact that William's daughters will take as coparceners instead of successively is no objection: *Pitt* v. *Jackson* (3); *Vanderplank* v. *King*. (4)

[SWINFEN EADY J. Ethel, who is an object of the power, could not take under that estate tail.]

She cannot take under the will as it stands, owing to the prior invalid limitations. But if the limitations to William and his issue are construed as an estate tail, she takes a valid life estate in remainder.

Kenneth Wood, for the daughter Ethel. This is not a proper case for cy-près, as it is impossible to make the cy-près limitations fit the testator's intention; and, subject to William's life estate, Ethel takes one moiety in default of appointment.

Tomlin, for the infant Cyril. The testator's intention will be carried out by giving the estate to William in tail, with

(1) (1873) W. N. 198; 43 L. J. (Ch.) 107.

(2) (1843) 4 D. & War. 320; 65 R. R. 706.

(3) (1786) 2 Bro. C. C. 51. Reported on bill of review in *Smith* v. *Lord Camelford*, (1795) 2 Ves. Jun. 698; 3 R. R. 36, where the limitations and decree are more clearly stated.

(4) (1843) 3 Hare, 1; 64 R. R. 186.

remainder to Ethel for life, with remainder to Cyril in tail male.

[SWINFEN EADY J. That limitation would include William's granddaughters, for whom the testator did not intend to provide. It would, therefore, be contrary to the rule in *Monypenny* v. *Dering*. (1)]

That objection can be met by giving William an estate in tail male.

[SWINFEN EADY J. That would exclude William's daughters, who are appointees.]

That is immaterial. There is no rule against exclusion. The cy-près estate must be in favour of a class "or part of a class" intended to be provided for by the testator: Farwell on Powers, 1st ed. p. 249; 2nd ed. p. 316, adopting the head-note in *Monypenny* v. *Dering*. (1)

Cur. adv. vult.

Feb. 2. SWINFEN EADY J. (after stating the facts). It was contended that the effect of the appointment in Benjamin Rising's will was to give William an estate in tail general, or at all events an estate in tail male by cy-près, and that the Court should adopt a construction of the will which would give effect, as far as possible, to the whole of the testator's intention. The extent and application of the doctrine of cy-près in cases of this nature were explained by Lord St. Leonards in *Monypenny* v. *Dering*. (1) The object is to give effect to the general intent, but it is not (as in other cases) to be carried into effect at the expense of the particular intent; in applying the doctrine of cy-près nothing is to be sacrificed, and, moreover, neither by implication nor by the doctrine of cy-près can an estate be carried to a class or a portion of a class for whom the testator never intended to provide. In *Hampton* v. *Holman* (2) Jessel M.R. treated *Monypenny* v. *Dering* (1) as deciding that the doctrine of cy-près (which he considered was more properly described as a rule of construction) cannot be applied where the effect of so doing will be to make the estate devolve in a line of succession different from that which the testator

(1) 2 D. M. & G. 145, 173, 174. (2) 5 Ch. D. 183.

SWINFEN EADY J.

1904

RISING, *In re.* RISING *v.* RISING.

has expressly designated. Jessel M.R. expressed the rule a little differently from Lord St. Leonards, saying that the particular intent is only sacrificed so far as may be necessary to carry out the general intent according to law.

In the present case no kind of estate tail can be given by implication to William which would not sacrifice the particular intent and defeat the general intention of the testator, as expressed in his will, by excluding persons for whom he intended to provide, or by including a class or portion of a class for whom he did not intend to provide. In my opinion, it would be going far beyond any decided case, and, moreover, would be contrary to the principles laid down in the two cases to which I have just referred, to hold that William takes an estate in tail general or in tail male under the appointment. An estate for life is validly appointed to him, but in the events that have happened all the subsequent remainders fail.

Solicitors: *Williams & James, for Worship & Rising, Great Yarmouth.*

G. R. A.

SWINFEN EADY J.

1904

Feb. 4.

In re LORD WIMBORNE AND BROWNE'S CONTRACT.

[1903 W. 3953.]

Settled Land—Resettlement — Life Estate extinguished—Original Settlement subsisting — Sale by original Life Tenant — Compound Settlement — Trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 4, 5; *s.* 50—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 4.

A testator devised freeholds to the vendor for life, with remainders in strict settlement.

The property was subsequently disentailed, resettled, and appointed so as to extinguish the vendor's life estate, but the original settlement created by the will was still subsisting in respect of a jointure and portions charged under the powers thereof:—

Held, that the vendor could sell under the will alone, so that it was unnecessary to appoint trustees of the compound settlement created by the will and subsequent deeds.

In re Du Cane and Nettlefold's Contract, [1898] 2 Ch. 96, and *In re Mundy and Roper's Contract*, [1899] 1 Ch. 275, followed.

In re Cornwallis-West and Munro's Contract, [1903] 2 Ch. 150, distinguished.

VENDOR AND PURCHASER SUMMONS.

By his will dated September 9, 1850, a testator devised his freehold estates to the use of the vendor for life, with remainder to the use of the vendor's sons successively according to seniority in tail male, with divers remainders over in strict settlement.

The testator empowered the vendor to charge a jointure for his wife, and portions for his younger children, and to limit terms for securing the same.

The testator also empowered life tenants in actual possession, or entitled to the receipt of the rents and profits of his freehold estates, to sell the same with the approval of the trustees of his will, and directed the trustees to invest the proceeds of sale in the purchase (inter alia) of freehold lands to be settled to the same uses, and to stand possessed of his residuary personalty upon the same trusts as if it had been

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produced by sales of the freehold estates, with an immaterial exception.

The testator declared that the receipts in writing of the trustees for the time being should be a sufficient discharge for any money payable to them under his will.

The testator died on November 26, 1852.

On January 14, 1865, the trustees bought the Fifehead estate out of residuary personalty, and it was conveyed to them to the uses of the freehold estates with the immaterial exception aforesaid.

By his marriage settlement dated May 23, 1868, the vendor charged the Fifehead estate and other hereditaments with a jointure for his wife and portions for his younger children, and limited terms for securing the same.

By a disentailing assurance dated January 17, 1895, and made between the vendor of the first part, his eldest son of the second part, and Samuel Bircham of the third part, the Fifehead estate and other hereditaments were assured (subject to the jointure and portions and the terms for securing the same) to such uses as the vendor and his son should by deed jointly appoint, and subject thereto to the subsisting uses, so as to restore and confirm the same.

By a resettlement dated January 19, 1895, and made between the vendor of the first part, his son of the second part, and certain trustees of the third part, the vendor and his son appointed the Fifehead estate and other hereditaments (subject to the jointure and portions and the terms for securing the same) to such uses as the vendor and his son should by deed jointly appoint, and subject thereto to certain uses for securing a rent-charge of 1500*l.* to the son during the joint lives of himself and the vendor, and subject thereto to the use of the vendor for life in restoration and confirmation of his life estate under the will, and so as to restore all powers annexed or appendant to that life estate, and after the vendor's death to certain uses for raising estate duties, and subject thereto to the use of the son for life, with divers remainders over in strict settlement.

By a conveyance dated July 20, 1895, and made between

the vendor of the first part, his son of the second part, and Samuel Bircham of the third part, the son released the 1500*l.* rent-charge, and the vendor as to his life estate granted the Fifehead estate to the use of his son, his heirs and assigns.

By an appointment dated March 20, 1899, and made between the vendor of the first part, his son of the second part, and the trustees of the resettlement of the third part, the vendor and his son, in exercise of the power contained in the resettlement, appointed the Fifehead estate (subject to the jointure and portions and the terms for securing the same) to such uses as would be subsisting under the resettlement if the vendor were then dead.

By a contract dated October 6, 1903, and made between the vendor of the first part, his son of the second part, and the purchaser of the third part, the vendor, with his son's concurrence and consent, agreed to sell the Fifehead estate to the purchaser.

The contract stated that the vendor was selling, and would convey as life tenant or the person having the powers of a life tenant, for the purposes of the Settled Land Acts, under the settlement made by the will, and that the purchase-money would be paid to the trustees of the will.

This summons was issued by the purchaser to determine whether the vendor could sell under the will alone, or whether he could only sell under the compound settlement created by the will and subsequent deeds, so as to necessitate the appointment of trustees of that compound settlement.

Vernon Smith, K.C., and *G. J. Duncan*, for the purchaser. Where the original settlement is subsisting, and the original life estate is restored, the life tenant can only sell under the compound settlement: *In re Cornwallis-West and Munro's Contract* (1); a fortiori if not restored.

In the present case the old life estate was restored by the resettlement, and it was not merged by the conveyance of July 20, 1895: *Barry Ry. Co. and Lord Wimborne.* (2) At that date, therefore, the vendor could only have sold under the compound settlement, and it would be strange indeed if the

(1) [1903] 2 Ch. 150. (2) (1897) 76 L. T. 489.

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destruction of his life estate on March 20, 1899, enabled him to sell under the will alone.

J. G. Wood, for the vendor. There is no doubt a compound settlement in the present case, but the original settlement under the will is also subsisting owing to the jointure and portions charged under that settlement, and the vendor's powers thereunder are still exercisable although his life estate is gone: Settled Land Act, 1882, s. 2, sub-ss. 1, 4, 5; s. 50; Settled Land Act, 1890, s. 4; *In re Du Cane and Nettlefold's Contract* (1); *In re Mundy and Roper's Contract.* (2)

On February 8, 1897, Stirling J. held in chambers that the present vendor could sell under the will alone, but the property in question was not affected by the conveyance of July 20, 1895: *In re Lord Wimborne and Lees' Contract* [1897 W. 176]. (3) In the subsequent case of *Barry Ry. Co. and Lord Wimborne* (4) the property was affected by that conveyance, but North J. held there was no merger. The compound settlement question was also raised; but, having regard to the decision of Stirling J., it was not pressed, and the title was in fact made under the will alone.

The life estate was no doubt then subsisting, but the vendor's powers remain exercisable although his life estate is now gone: Settled Land Act, 1882, s. 50; *In re Mundy and Roper's Contract.* (2)

In *In re Cornwallis-West and Munro's Contract* (5) the vendor proposed to sell under the resettlement alone, and the question was argued and decided on that footing. Farwell J. apparently held that the only life estate then or ever in existence was that created by the will, so that the sale could not be made as proposed.

So far as the language of his judgment goes beyond this, and implies that a sale could not have been made under the will alone, it is an obvious slip, as it is inconsistent with *In re Du Cane and Nettlefold's Contract* (1) and *In re Mundy and Roper's Contract* (2), which he followed.

(1) [1898] 2 Ch. 96.
(2) [1899] 1 Ch. 275, 290, 295, 296.
(3) Unreported.
(4) 76 L. T. 489.
(5) [1903] 2 Ch. 150.

There is a further point not raised by the summons. It has been assumed that the present trustees of the will are trustees for the purposes of the Settled Land Act, as their approval is required on a sale by the life tenant in actual possession. As the vendor's life interest in the Fifehead estate is gone, there is a possible doubt whether they are trustees for the purposes of the Acts in respect of that estate, and both parties desire them to be so appointed, in case the Court is in the vendor's favour.

SWINFEN EADY J. (after stating the facts). The question is whether the vendor can sell under the will alone, or whether he can only sell under the compound settlement created by the will and the subsequent deeds so as to necessitate the appointment of trustees of that compound settlement.

An original settlement and a compound settlement may subsist side by side, and the mere fact that the life tenant has parted with his life estate does not prevent him from exercising his statutory powers under the original settlement: *In re Du Cane and Nettlefold's Contract* (1); *In re Mundy and Roper's Contract.* (2)

In the present case, the original settlement created by the will is still subsisting, as by reason of the jointure and portions charged and remaining to be raised thereunder the lands still stand limited to persons by way of succession under that instrument: *In re Mundy and Roper's Contract.* (2)

If that were all, it would be clear from those authorities that the vendor could sell under the original settlement, and that the trustees of that settlement could give a valid discharge for the purchase-money.

It is contended, however, that this view is contrary to *In re Cornwallis-West and Munro's Contract* (3), and that where there are instruments constituting a compound settlement the life tenant can only sell under that compound settlement, and trustees of that compound settlement can alone give a discharge for the purchase-money, although limitations under the original settlement are still subsisting.

(1) [1898] 2 Ch. 96. (2) [1899] 1 Ch. 275.
(3) [1903] 2 Ch. 150.

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I have the authority of Farwell J. for stating that the true explanation of that case is that as the old life estate created by the will had been restored, the tenant for life could not sell and confer a good title under the resettlement alone, as he proposed to do; and as there were no trustees for the purposes of the Settled Land Act of the settlement created by the will, the tenant for life could not as matters then stood sell under the will alone. The learned judge did not decide—and did not intend to decide—that the vendor could not sell and make a good title as tenant for life under the will, if and when trustees were appointed for the purposes of the Settled Land Acts. Indeed, the contrary was assumed in the argument before him. In the present case, the original settlement is still subsisting, and the vendor can exercise his statutory powers thereunder.

Under these circumstances I declare that the vendor can sell under the will alone, and that trustees of the will for the purposes of the Settled Land Acts can give a valid receipt for the purchase-money.

As the parties are agreed that it is doubtful whether the existing trustees of the will are trustees for the purposes of the Settled Land Acts in respect of the Fifehead estate, I appoint them trustees of the will for those purposes in respect of that estate.

Solicitors: *Thrupp, Chidell & Sharp; Bircham & Co.*

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Feb. 4, 5, 9.

[1903 A. 401.]

Will—Attesting Witness—Devise to Daughter or her Children—Attestation by Husband—Intestacy—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 15.

Sect. 15 of the Wills Act, though avoiding (inter alia) a devise to the wife of an attesting witness, quoad her interest, does not strike the devise out of the will. The will must therefore be construed before s. 15 is applied.

General devise after the death of testator's wife to his daughter or her children. The daughter, whose husband attested the will, survived the wife and had children :—

Held, an intestacy.

In re Townsend's Estate, (1886) 34 Ch. D. 357, followed.

Jull v. *Jacobs*, (1876) 3 Ch. D. 703, and *In re Clark*, (1885) 31 Ch. D. 72, explained and distinguished.

SUMMONS to vary certificate.

By his will dated August 20, 1885, a testator disposed of his freehold estate during his wife's life, and directed that after her decease the whole of it should be equally divided as follows, namely, one-half to his daughter Hannah's children, and one-half to his daughter Ellen or her children.

Ellen's husband attested the will.

The testator died on January 31, 1886. He had two children, namely, Hannah, who predeceased him, and Ellen, who was still living and had children.

The wife died on January 26, 1903.

On March 7, 1903, a partition action was commenced, and on April 6, 1903, the usual inquiries were ordered. In answer to the inquiry as to the persons interested, the master treated the moiety devised to Ellen or her children as undisposed of, and certified that one-half of it went to Ellen and the other half to Hannah's eldest son, as co-heirs of the testator.

Ellen and her children now claimed that the children were entitled to the whole moiety, and sought to vary the certificate accordingly.

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It was admitted that, apart from s. 15 of the Wills Act, the devise to Ellen or her children must be construed as a devise to Ellen if living at the wife's death, otherwise to her children.

Austen-Cartmell, for Ellen and her children. The real question is whether the will is to be first construed apart from s. 15 of the Wills Act, and the gift to Ellen then declared null and void, or whether the gift is to be struck out before construction, except for referential purposes, such as defining the children. The latter view is more consistent with the authorities. In *Young* v. *Davies* (1), where there was a gift to a class as joint tenants and one of them attested the will, Kindersley V.-C. held that the joint tenancy was not severed, but the whole went to the members of the class capable of taking.

In *Fell* v. *Biddolph* (2) there was a devise to a class as tenants in common, and two of the devisees attested the will. In delivering the judgment of the Court of Common Pleas Lord Coleridge C.J. said: "By the operation of the statute, the names of Thomas and Sarah . . . . are struck out of the will: they are rendered incapable of taking, and therefore in our judgment are not to be reckoned in the class." There was, therefore, no lapse.

This was approved in *In re Coleman and Jarrom* (3), where Jessel M.R. said: "I think that is the true rule"; and later on he said: "I think the true rule is that those members of the class who are at the testator's death capable of taking take, and that those who become incapable of taking—whether by dying in the testator's lifetime, or by attesting the will, or by some other operation of law—do not take."

[SWINFEN EADY J. Those authorities are confined to class gifts.]

In *Jull* v. *Jacobs* (4), where the life tenant attested the will, Malins V.-C. held that there was no interim intestacy, but that the remainder was accelerated.

(1) (1863) 2 Dr. & Sm. 167.
(2) (1875) L. R. 10 C. P. 701, 709.
(3) (1876) 4 Ch. D. 165, 172, 173.
(4) 3 Ch. D. 703.

In *In re Townsend's Estate* (1) Chitty J. held that there was an interim intestacy until the remainderman was born, but that then the remainder would be accelerated as in *Jull* v. *Jacobs*. (2)

In neither case was there an intestacy during the whole life tenancy.

In *In re Clark* (3) Bacon V.-C. applied the same principle to alternative gifts, holding that the first alternative was blotted out by the statute, and the second alternative took effect, although the exact contingency had not occurred.

In the present case it is perfectly clear that the testator intended the children to take, if Ellen did not take, and the result of the authorities is that the devise must be construed as a devise to Ellen if living at the wife's death and capable of taking, otherwise to her children.

Gatey, for the co-heir and other parties. The will must be construed before s. 15 is applied. In class gifts the class is no doubt restricted to members capable of taking, and, in the case of life tenant and remainderman, the remainderman takes subject to the life tenant's interest, however terminated. But this principle cannot be applied to alternative gifts.

In re Clark (3) is at first sight against me, but the judgment of Bacon V.-C. shews that he really construed the gift as a gift to life tenant and remaindermen. In the present case the gift is clearly alternative, and as Ellen is living, so that the contingency on which the children take has not occurred, there is an intestacy.

SWINFEN EADY J. It is not disputed that, apart from s. 15 of the Wills Act, the devise must be construed as a devise to Ellen if living at the wife's death, otherwise to her children.

Ellen's husband having attested the will, it is clear she cannot take, as s. 15 of the Wills Act provides (inter alia) that a devise to the wife of an attesting witness "shall, so far only as concerns such . . . . wife . . . . be utterly null and void." The devise to Ellen is, therefore, utterly null and void.

(1) 34 Ch. D. 357, 360. (2) 3 Ch. D. 703.
(3) 31 Ch. D. 72.

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It is contended that under these circumstances the devise to Ellen must be treated as struck or blotted out of the will, so that the alternative devise to the children alone remains, and they take immediately.

The first answer to that contention is that the Wills Act does not say the devise is to be struck out, but merely that it shall be null and void, so far only as the devisee is concerned.

The second answer is that if the devise to Ellen were struck out there would be simply a devise to "her children," with nothing to identify them.

It was urged that *In re Clark* (1) shewed that the devise to Ellen ought to be treated as struck out, but that the devise to "her children" might be amplified by reading the devise to Ellen, in order to shew whose children were intended.

Reliance was also placed on *Jull* v. *Jacobs* (2) and *In re Townsend's Estate.* (3)

Now in *Jull* v. *Jacobs* (2) the testator gave property to his daughter "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age." The daughter having attested the will, it was held that the remainder was accelerated. In arriving at that conclusion Malins V.-C. referred to *Lainson* v. *Lainson* (4), where Romilly M.R. said: "Although the expression used is that the estate to the son of John Lainson is only to take effect 'from and after John Lainson's decease,' I am of opinion that the meaning is, 'from and after the determination of his estate by death or otherwise.'"

Again, Malins V.-C. put the case of a testator giving property "to A. for life, and after the decease of A. to B.," or "after the decease of A. to A.'s children," and said: "It is a remainder vested if there are children, or contingent if there are no children. Whenever the life estate expires those in remainder take. Therefore, under the old law, when life estates were forfeitable by any of those acts which formerly would have caused a forfeiture; where property was limited to A. for life, and after the decease of A. to A.'s children, if A.

(1) 31 Ch. D. 72.
(2) 3 Ch. D. 703, 709, 711.
(3) 34 Ch. D. 357, 360.
(4) (1853) 18 Beav. 1, 6.

had forfeited the life estate his children would have immediately a right, because 'from and after the decease' means from and after the determination of the life estate, and however it is terminated, whether by the death of the tenant for life or by forfeiture, it is equally gone."

He held that in such a case A.'s life estate must be treated as a determinable interest, so that, if it were rendered null and void by his attestation of the will, the remainder would be accelerated.

In *In re Townsend's Estate* (1) Chitty J. said: "I accept without question Vice-Chancellor Malins' decision in *Jull* v. *Jacobs* (2), and should feel bound to follow it if the case were one which allowed the application of the doctrine of acceleration."

In *In re Townsend's Estate* (1) a testatrix gave property to her brother for life, and after his death to his children; but if he died without leaving issue living at his death, then to the children "then living" of certain other persons.

The life tenant, whose wife attested the will, had no children. Chitty J. held that the doctrine of acceleration was inapplicable as the life tenant had no children, and the persons contingently entitled could only be ascertained at his death, so that under the circumstances there was an intestacy till the life tenant had a child.

Neither case is any authority for holding that if there is an absolute gift to A., if living at a certain period, otherwise to B., B. can take if A. though living at the period forfeits his interest by attesting the will. *In re Townsend's Estate* (1) is an authority to the contrary. In that case Chitty J. said: "Sect. 15 of the Wills Act (1 Vict. c. 26) enacts that gifts to an attesting witness or to the wife or husband of the attesting witness shall be null and void, but does not say that the gift is to be treated as if it were struck out of the will. Whether that is or is not the effect of the section is the question now to be decided." His judgment really negatives the proposition.

In re Clark (3) was, however, strongly relied on before me in

(1) 34 Ch. D. 360. (2) 3 Ch. D. 703.
(3) 31 Ch. D. 72.

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support of that proposition. In that case the testator gave property to his wife for life, and after her decease to his children living at her death in equal shares, and in case any child died before his wife leaving children, those children were to take their parent's share; and in the event of a daughter being married at the wife's decease, her share was left to her and her children exclusively, and in no way to be controlled by her husband. A daughter, whose husband attested the will, survived the wife, and Bacon V.-C. held that her children took her share. He said: "I must read this will as if either this gift to the daughter had not been in it, or being in it had been blotted out by the testator. That is what is really done by the statute. I cannot read it as a gift that failed so as to disappoint anybody who was entitled subsequently to that gift."

The latter words indicate that Bacon V.-C. construed the gift as a gift to the daughter for life with remainder to her children, accelerated by the failure of the life interest, and on that construction the decision would follow *Jull* v. *Jacobs*. (1)

In the present case, where there is an absolute gift to Ellen if living at the wife's death, otherwise to her children, I am asked to blot out the gift to Ellen, and give the property to her children, although she is living.

The proper way of dealing with these cases is first to construe the will, and ascertain what interests are given, and then to apply s. 15 of the Wills Act. I cannot, therefore, disregard the gift to Ellen. On the face of the will she takes absolutely in the events that have happened, and, her interest being rendered null and void by s. 15 of the Wills Act, there is an intestacy as to her share. I therefore dismiss the summons to vary.

Solicitors: *Arthur Price; Church, Rendell & Co., for Kite, Broomhead & Kite, Taunton.*

(1) 3 Ch. D. 703.

G. R. A.

In re OLDFIELD.
OLDFIELD *v.* OLDFIELD.

[1903 O. 955.]

C. A.
1903
KEKEWICH J.
Nov. 10.
C. A.
1904
Feb. 26.

Will—Construction—Precatory Trust—"I desire."

A testatrix gave all her property equally amongst her two daughters "as tenants in common for their own absolute use and benefit," and appointed them her executrixes. She then added, "My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments under this my will":—

Held, that no trust was created in favour of the son.

The principles stated in *In re Williams*, [1897] 2 Ch. 12, 18, 29, upon which equitable obligations by way of trusts or conditions are or are not to be inferred from the language of a will, applied. (1)

In 1902 Mary Oldfield, widow, made her will as follows: "I give, devise, and bequeath all my real and personal property over which I have any power of appointment or otherwise unto and equally amongst my two daughters, Kate Oldfield and Sarah Florence Oldfield, as tenants in common for their own absolute use and benefit. And I appoint my said daughters Kate Oldfield and Sarah Florence Oldfield to be the executrixes of this my will. My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments under this my will."

The testatrix died in 1903, leaving personal estate only, and no real estate.

This was an originating summons taken out by James Reffitt Oldfield, the son of the testatrix, against the two daughters for the determination of the question whether the will created an effectual trust in favour of the plaintiff during his life of one-third share of the income of the estate of the testatrix, or whether the will operated only as an expression of an unenforceable desire.

The summons was heard before Kekewich J. in chambers,

(1) See *In re Hanbury*, p. 415, ante.

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and was afterwards adjourned into Court, and heard on November 10, 1903.

Gatey, for the plaintiff, referred to *In re Hamilton* (1) and *In re Williams*. (2)

E. Ford, for the defendant.

KEKEWICH J., after stating the terms of the will, continued:—If not controlled by authority, I should not think for a moment that the expression "I desire" was intended to be imperative. If, however, it is intended to be imperative, then it creates a trust, and, whether the word used be "desire" or any other word, if a trust is created, it can be enforced under the will. Apart from authority, and looking at it as an intelligent layman, why should the Court hold it to be a trust, or why should it be construed to be imperative? It seems to me that, on the natural and proper construction of the words, this is a mere expression by the testatrix of her hope, her desire, her wish, not imperative, but the fulfilment of which she left to the discretion of her daughters, that her son should have some benefit. It looks very much as if she were not disposed to make any bequest in favour of her son, but at the same time hoped her daughters would benefit him. That seems to me to be the natural construction of the words as they stand. Am I controlled by authority? I may venture to say that two or three generations back this would have been construed to be a trust. The words quoted by Rigby L.J. in *In re Williams* (3) from the judgment of Lord Langdale—no mean authority—in *Knight* v. *Knight* (4) seem to point to that. He does not use the word "desire," but uses a weaker expression, namely, "recommend." It is sufficient for me to say that what Lord Langdale laid down is now no longer law. There are many cases which shew that the Court is inclined now to accept the natural construction of words of this character. The case of *In re Hamilton* (1), which has been referred to, was also referred to by the Court of Appeal in *Hill* v. *Hill* (5),

(1) [1895] 2 Ch. 370.
(2) [1897] 2 Ch. 12.
(3) Ibid. 29.
(4) (1840) 3 Beav. 148, 172; 52 R. R. 74, 84.
(5) [1897] 1 Q. B. 483, 493.

in which Chitty L.J. said this: "In the case before us the term 'trust' does not occur. A trust undoubtedly may be created by any apt words; but the circumstance that the well-understood and obvious term 'trust' is not used, seems to me to be worthy of some consideration where the question is whether a trust is or is not intended to be created." That observation seems to me to be extremely pertinent to a case like this, where there is a gift absolutely to the two daughters, and, instead of words of imperative character, the word "desire" is used. I venture to say in common parlance a desire carries no obligation except a moral one. To desire a person to do a thing is entirely different from telling him to do it. I must hold, upon the construction of this will, that no trust was created in favour of the plaintiff.

The plaintiff appealed.

The appeal was heard on February 26, 1904.

Levett, K.C., and *Gatey*, for the plaintiff. The word "desire" in a will is sufficient to create a trust: *Harding* v. *Glyn*. (1) Even a recommendation is sufficient: *Malim* v. *Keighley*. (2)

[COZENS-HARDY L.J. Lindley L.J. declined to follow that case in *In re Hamilton*. (3)]

But *Malim* v. *Keighley* (2) was followed in *Knight* v. *Knight* (4), where Lord Langdale stated the rule, and this rule was recognised by the House of Lords in that case on appeal: *Knight* v. *Boughton*. (5) Lord Lindley, then Lord Justice, when he was delivering judgment in *In re Hamilton* (3), was not aware that *Malim* v. *Keighley* (2) had been followed by the House of Lords, or he would not have said what he did. The rule as laid down by Lord Alvanley in *Malim* v. *Keighley* (2) is that wherever a person, in giving property, points out the objects, the person, and the way it shall go, that

(1) (1739) 1 Atk. 469; 5 Ves. 501; 8 Ves. 571; 4 R. R. 334, 338; 2 W. & T. 7th ed. p. 335.

(2) (1794) 2 Ves. Jun. 333; 2 R. R. 229.

(3) [1895] 2 Ch. 370, 373.

(4) 3 Beav. 148, 172; 52 R. R. 74.

(5) (1844) 11 Cl. & F. 513, 548, 551; 52 R. R. 74, 91, 93.

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creates a trust. *In re Hamilton* (1) cannot be reconciled with the earlier cases.

[COZENS-HARDY L.J. *In re Hamilton* (1) was followed by the Court of Appeal in *Hill* v. *Hill.* (2)]

The supposed precatory trust in the latter case was not in a will, but in a memorandum relating to jewelry. It was a peculiar case, for, as Lord Esher M.R. there points out (3), the memorandum was the supposed record of a mere conversation, which he refused to regard in the same way as a will. Moreover, in that case again the Court of Appeal had forgotten that the rule in *Malim* v. *Keighley* (4) had been adopted by the House of Lords in *Knight* v. *Boughton* (5), which does not appear to have been even cited.

Another case deciding that "desire" imposes a trust is *Cruwys* v. *Colman.* (6) The expression "wish and request" has the same effect: *Foley* v. *Parry.* (7)

The result is that, unless there is something in the will to rebut the construction, the word "desire" creates a trust; and we submit that there is nothing to rebut that construction in the present case. The Court is bound to see that, if possible, a testator's wish is attended to: *Liddard* v. *Liddard.* (8)

Ingpen, K.C., and *E. Ford*, for the defendants. With regard to *In re Hamilton* (1) Lindley L.J. must have considered *Knight* v. *Boughton* (5), for it was cited in argument. The old doctrine of precatory trusts should not now be extended. Where, as here, there is an absolute gift, it requires very strong and conclusive evidence of intention to turn what is in terms unqualified into an obligation: *In re Diggles.* (9) The principle is stated by Lindley L.J. in *In re Williams.* (10) To create a trust, the direction must be imperative in its terms; "desire" expresses a recommendation, and nothing more. Here the "desire" is really no part of the will at all; the will

(1) [1895] 2 Ch. 370.
(2) [1897] 1 Q. B. 483, 493.
(3) Ibid. 486–7.
(4) 2 Ves. Jun. 333; 2 R. R. 229.
(5) 11 Cl. & F. 513; 52 R. R. 74.
(6) (1804) 9 Ves. 319, 323; 7 R. R. 210.
(7) (1833) 2 My. & K. 138; 39 R. R. 163.
(8) (1860) 28 Beav. 266.
(9) (1888) 39 Ch. D. 253, 256.
(10) [1897] 2 Ch. 12, 18, 22.

is complete until the "desire" clause, and then the testatrix desires that the provision for the son shall come, not out of her own estate, but out of the income of the shares already given to the daughters: that is not the way in which a person would ordinarily try to create a trust.

In *In re Williams* (1) the word was "confidence," the strongest word possible, and yet it was held to mean nothing more than an expression of hope. (2) The older authorities went too far in holding that particular words in a will were sufficient to create a trust: *In re Adams and Kensington Vestry.* (3)

Levett, K.C., in reply. In *In re Diggles* (4) the expression was different from that here: it was "my desire is that she allows," indicating that the legatee was to exercise some choice.

VAUGHAN WILLIAMS L.J. In my opinion this appeal must be dismissed.

I will say a word or two in the first place upon the case in the House of Lords of *Knight* v. *Boughton* (5), to which Mr. Levett called our attention. His argument was this: it is quite true to say that the decision of the Court of Appeal in *In re Hamilton* (6), and also in *In re Williams* (1), and also in *In re Diggles* (4), departed from the old decisions in which it was held that a catalogue of words in a will, one of which was "desire," without more, raised a trust unless there was something in the will expressly to negative that construction. But, he said, the Court of Appeal in all those cases was mistaken; it had not been called to their attention that the case of *Malim* v. *Keighley* (7)—in which Lord Alvanley M.R. laid down the rule that "wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shews clearly, that his desire expressed is to be controlled by the

(1) [1897] 2 Ch. 12.
(2) Ibid. 15.
(3) (1884) 27 Ch. D. 394, 410.
(4) 39 Ch. D. 253, 257.
(5) 11 Cl. & F. 513; 52 R. R. 74.
(6) [1895] 2 Ch. 370.
(7) 2 Ves. Jun. 333, 335, 529a; 2 R. R. 229.

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party; and that he shall have an option to defeat it"—was affirmed expressly by the House of Lords.

Now, I may point out that *Malim* v. *Keighley* (1) was brought to the notice of Lindley L.J. in *In re Hamilton* (2), and that he purported to overrule it. Mr. Levett says he would not have done so if he had been aware that *Malim* v. *Keighley* (1) had been affirmed by the House of Lords in *Knight* v. *Boughton*. (3) No doubt the House of Lords affirmed the passage I have just quoted from the judgment in *Malim* v. *Keighley* (1), and which is also quoted in *In re Hamilton* (4); but it all depends on how you read the words of Lord Alvanley. If you read those words as meaning "the way in which the property shall go" (in the imperative), there is nothing, to my mind, in any of those cases to shew that that would be contrary to what was affirmed by the House of Lords in *Knight* v. *Boughton*. (5)

Having said that, I will now deal with the case before us. [His Lordship then read the first clause in the will comprising the gift to the daughters absolutely, and continued:—] Thus far we have very strong words to shew that the intention of the testatrix was that these two ladies should not only have the legal estate in everything she had to leave, but should have that legal estate for their own absolute use and benefit. That being so, if I found that any express trust had been intended to be created controlling the use of the property by these two daughters, I should have expected to find very strong words to that effect. What are the words which are said to create a trust? They are these: [His Lordship then read the clause commencing "I desire," and continued:—] Now, in the first place, I would point out that the income with regard to which the testatrix has expressed her "desire" does not extend to real property; and, in the next place, it does not extend to the estate of the testatrix—to that which she was leaving—but to the income which would come to the daughters respectively "from moneys and investments under this my will." Those

(1) 2 Ves. Jun. 333, 529 a; 2 R. R. 229.
(2) [1895] 2 Ch. 370.
(3) 11 Cl. & F. 548; 52 R. R. 90.
(4) [1895] 2 Ch. 372.
(5) 11 Cl. & F. 513; 52 R. R. 74.

"investments" cannot, in my opinion, mean the investments belonging to the testatrix up to the time of the death of the testatrix in the sense of money being property with regard to which a trust was to be raised before anything came to the daughters. What this is, is a desire expressed with regard to the income of the share which each daughter was to take absolutely under the first clause of the will. Under these circumstances, one has to ask oneself this: Would any one desiring to create a trust have created it by the use of such language as is used by this testatrix? Is it not more probable that, if she had intended to create such a trust, she would have left her property to the daughters charging one-third of the income of the property with a trust in favour of the son, and then have given the residue of the income or of the property, subject to the life interest to the son, to the daughters? In my judgment, there is nothing in this expression of desire sufficient to cut down the absolute gift for the use and benefit of the daughters which is comprised in the first part of the will.

Accordingly, I am of opinion that the decision of the learned judge should be affirmed, and the appeal dismissed.

STIRLING L.J. I am of the same opinion.

With regard to the law, so far as it is necessary for the decision in this case, there does not seem much difficulty. It is sufficient to refer to the recent decision of the Court of Appeal in *In re Williams* (1); and I do so because there was a difference of opinion among the learned judges in that case in the application of the law; but looking at the judgments of Lindley and Rigby L.JJ., although they differed in opinion upon the construction of the will before them, I think that what they laid down as being the law is substantially the same. Lindley L.J. says this (2): "There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to shew an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is and

(1) [1897] 2 Ch. 12. (2) [1897] 2 Ch. 18.

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in whose favour it is to be performed. There is also abundant authority for saying that, if property is left to a person in confidence that he will dispose of it in a particular way as to which there is no ambiguity, such words are amply sufficient to impose an obligation." Then, after referring to the cases, he proceeds: "But still in each case the whole will must be looked at; and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference."

Then, when I turn to what Rigby L.J. says, I find that he cites (1) the passage which was quoted to us from the judgment of Lord Langdale in *Knight* v. *Knight* (2), in which the general rule is stated to be that a trust is created, first, if the words are, on the whole, to be considered as imperative; secondly, if the subject of the recommendation or wish is certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish are also certain; and an instance is given of the application of the rule. Upon that passage from Lord Langdale's judgment Rigby L.J. comments thus: "In the instance so given by Lord Langdale it is to be assumed that there is nothing in the will to prevent the words of request from being imperative. Very slight indications throwing doubt upon this might be sufficient to lead to a contrary conclusion."

Now, those two propositions, one stated by Lindley L.J. and the other by Rigby L.J., seem to coincide as regards the law applicable to the present case; and all we have to consider is whether the expression "I desire" is such as to impose an obligation on the defendants in this case.

The testatrix commences her will in these words: [His Lordship then read the first clause of the will, and continued:—] Under those words the two daughters take as tenants in common and not, as trustees usually do, as joint tenants; they take for their own absolute use and benefit—that is, with full power to deal with the property as they may think fit. Then, after appointing executors, the testatrix goes on

(1) [1897] 2 Ch. 29. (2) 3 Beav. 172; 52 R. R. 74, 84.

thus: [His Lordship then read the clause commencing "I desire," and continued:—] Now does that create a trust? If so, it is entirely inconsistent with the previous clause by which this property is given to the two ladies for their own absolute use and benefit. If a trust is created, what is it? It does not impose a joint obligation upon these two ladies, as would be the case if they were trustees, but each daughter is to pay the son out of her own income; so that, if it were a trust, it would be a separate obligation on each daughter to take her own income and pay out of it one-third to the son during his life. I cannot think that this is what was meant.

Looking at the whole will, I am of opinion that it was only intended to express a wish that each daughter was to have the use and enjoyment of her own income, and that the expression of a wish was not to impose an obligation.

COZENS-HARDY L.J. I am of the same opinion, and for the same reasons.

Solicitors: *Church, Rendell & Co., for A. F. Seldon, Barnstaple; C. W. Dommett & Son, for F. R. Paull, Harrogate.*

G. I. F. C.

C. A.
1904
Feb. 29;
March 1.

TOWERS *v.* AFRICAN TUG COMPANY.

[1903 T. 535.]

Company—Directors—Ultra Vires—Dividend out of Capital — Shareholders, Action on behalf of—Ratification—Acquiescence—Retention of Dividend by Plaintiff—Right to maintain Action.

The accounts of a limited company, at the commencement of their financial year, in 1900, shewed a considerable debit balance on the previous year's trading, but the directors illegally though honestly applied a profit made in the earlier part of 1900 in payment of an interim dividend instead of in reduction of the debit balance, thus, in effect, paying a dividend out of capital. The balance-sheet for 1900 shewing the debit balance and also the payment of the dividend was submitted to and approved by the shareholders in general meeting. Subsequently, the directors, recognising their mistake, proposed to apply any future profits in wiping out the debit balance, and this was almost entirely accomplished out of profits in 1901 and 1902, as appeared from the balance-sheets for those years submitted to and approved by the shareholders in general meeting.

In 1903 two of the shareholders who had themselves received their portions of the dividend, and concurred in passing the balance-sheets, commenced an action "on behalf of themselves and all other the shareholders of the company" against the company and the directors to compel the directors to repay to the company the amount of the dividend. Afterwards the other shareholders were, at their own request, joined as defendants. All the defendants counter-claimed, in the event of the Court holding that the dividend had been illegally paid, for repayment by the plaintiffs of the portions received by them:—

Held, by Byrne J., that, the payment of the dividend being an act ultra vires, the directors were liable to replace the amount, and judgment was given in the action accordingly, the plaintiffs submitting to judgment against themselves on the counter-claim.

On appeal by the defendants from the judgment in the action:—

Held, that in the circumstances the plaintiffs were not entitled to maintain the action, but that the judgment on the counter-claim must stand.

Per Vaughan Williams and Cozens-Hardy L.JJ.: A shareholder in a limited company who has, with full notice or knowledge of the facts, himself received part of the proceeds of an ultra vires act committed by the directors—such as payment of a dividend out of capital—and who still retains the money, cannot, either individually or as suing on behalf of the general body of shareholders, maintain an action against those directors: nor (per Vaughan Williams L.J.) can he do so even if, after

action brought and before trial, he repays the money he has wrongfully received. Whether he can do so if, before action, he repays the money, *quære.*

THE African Tug Company, Limited, was incorporated in 1896 under the Companies Acts, 1862 to 1893, with a memorandum and articles of association and a nominal capital of 4000*l.* in eighty shares of 50*l.* each. The defendants, Thomas Norne Alexander, James Ambrose Wood, and another, were the first directors, the defendant Alexander being chairman. In 1898 the plaintiff Paskell Wedlake became the third director. The plaintiff, William Hunter Towers, was the secretary and manager of the company. He and the plaintiff Wedlake carried on a business together as partners. Under the articles of association two directors formed a quorum. Both plaintiffs were shareholders in the company. The company regularly carried on its business from the time of its incorporation.

The company's yearly balance-sheet made up to July 31, 1899 (the end of the company's financial year), shewed a loss represented by a debit balance of 756*l.* 10*s.* 11*d.* In the five months following that balance-sheet, namely, from August 1 to December 31, 1899, the company made a certain profit, though not sufficient to wipe out that debit balance. In March, 1900, several of the shareholders proposed to the directors that an interim dividend should be paid, payment of an interim dividend being authorized by the articles of association. During the same month a correspondence on the subject took place between the defendant Alexander and the plaintiff Towers, the secretary and manager, in which Towers, though recognising that from August 1 to December 31, 1899, the company had made a profit, contended that until the debit balance was wiped out payment of an interim dividend as proposed would be a payment out of capital which would be illegal. The defendants Alexander and Wood took the opposite view, and an interim dividend of 5 per cent., amounting to 127*l.* 10*s.*, was shortly afterwards paid to the shareholders through the plaintiff Towers, as secretary, on the faith of a resolution passed and signed by those two directors on March 20, 1900, and confirmed by them at a meeting held on July 5, 1900, at which the

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plaintiff Towers was present as secretary. The third director, the plaintiff Wedlake, took no part in the passing of that resolution; neither was he present at the last-mentioned confirmatory meeting. Each of the plaintiffs Towers and Wedlake accepted, and without protest, a dividend, amounting to 15*l.* and 17*l.* respectively, on the shares held by them.

When the balance-sheet for the year ending July 31, 1900, came to be prepared it appeared that the profit for that year amounted to 245*l.* 18*s.* 4*d.*, which, of course, was not nearly sufficient to wipe out the debit balance of the previous year of 756*l.* 10*s.* 11*d.* The balance-sheet contained these entries on the assets side of the account: "Overpaid Dividends, 36*l.* 17*s.* 11*l.*," and "Dividends not Earned, 127*l.* 10*s.*"; making a total of "164*l.* 7*s.* 11*d.*" It also shewed a liability, on profit and loss account, of 510*l.* 12*s.* 7*d.*, being the previous debit balance of "756*l.* 10*s.* 11*d.*, less profit for the year 245*l.* 18*s.* 4*d.*"

The balance-sheet, with these entries, was approved by a meeting of the directors held on September 14, 1900, and it was also submitted to and adopted at a meeting of shareholders held on the same day, the plaintiffs Towers and Wedlake being present at both meetings, and the plaintiff Wedlake seconding the adoption of the balance-sheet at the shareholders' meeting. Both meetings had also before them a report of the auditor, dated August 28, 1900, explaining the insertion of the above items, and stating that the interim dividend was unearned, that it was illegal to pay dividends unless they were earned, and that the directors were liable in such a case, as it amounted to paying dividends out of the capital.

The balance-sheet for the year ending July 31, 1901, shewed a further profit applied in further reducing the debit balance, and the next balance-sheet, that for the year ending July 31, 1902, shewed a profit nearly wiping out the debit balance though not sufficient for payment of a dividend. Both these balance-sheets were submitted to and approved at directors' meetings at which both the plaintiffs were present, and were then adopted at shareholders' meetings at which the plaintiffs were again present. In fact at each of these shareholders'

meetings the resolution for adoption of the balance-sheet was seconded by the plaintiff Wedlake himself.

At a meeting of the three directors held on March 12, 1903, a resolution was passed, the plaintiff Wedlake dissenting, dismissing the plaintiff Towers from his office of secretary and manager to the company.

On March 20, 1903, the plaintiffs commenced this action, suing "on behalf of themselves and all other the shareholders of the defendant company other than those who are defendants," against the company, Alexander and Wood, the rest of the shareholders, twelve in number, some of whom were infants, being afterwards added as defendants at their own request, claiming (amongst other relief to which it is not necessary to refer in this report), (1.) a declaration that the resolution passed by the defendants Alexander and Wood for payment of the interim dividend, and the payment itself, were respectively ultra vires and illegal; and (2.) a declaration that the defendants Alexander and Wood were jointly and severally liable to make good to the company the 127*l.* 10*s.* paid on account of such dividend, with interest, and judgment against them jointly and severally for payment accordingly.

Paragraph 14 of the statement of claim was as follows: "The plaintiff Wedlake was never consulted as to or took part in the declaration or payment of the said 5 per cent. dividend."

In the statement of defence delivered on behalf of all the defendants, the defendants objected that the action could not be maintained, inasmuch as the company was not plaintiff; that the action was brought by two shareholders only, and not in fact on behalf of any other shareholder; and that all the other shareholders had been added as defendants at their own request in order to oppose the plaintiffs' claims. They further alleged that if the interim dividend was paid illegally, it was paid in good faith and in the honest exercise of the discretion vested in the directors by the articles, and in the reasonable belief that it was properly payable; that in any case all the shareholders, including the plaintiffs, had all the facts placed before them and were satisfied in the circumstances that it

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was proper to declare such a dividend; that all the shareholders acquiesced therein and accepted payment of the dividend, no creditor being in any way affected thereby; and that in the circumstances the plaintiffs were estopped from putting forward the claims made by them, and in any case were barred by their own laches and acquiescence, and were not entitled to the relief claimed contrary to the wishes of the company and of all the other shareholders. Paragraph 14 of the statement of claim was not denied in the statement of defence. The defendants then made a counter-claim (in the event of the plaintiffs being declared entitled to the relief claimed in respect of the dividend), stating that the dividends paid to the plaintiffs on their holdings, and amounting to 15*l.* and 17*l.* respectively, "the plaintiffs took and have ever since retained with full notice of all the facts relating thereto": if such dividends were illegally paid (which the defendants denied), then and in that event only the defendants counter-claimed repayment of those sums so received by the plaintiffs respectively, with interest and costs. In the course of the trial it was stated that the plaintiffs were prepared to pay back to the company the dividends they had themselves received.

The action was tried on November 6, 1903, before Byrne J., who held that the defendant directors must replace the 127*l.* 10*s.*, with interest at 4 per cent. His Lordship said that the plaintiffs had allowed a considerable time to elapse before complaining of these matters, but they now asked that the defendant directors might be ordered to pay the company the amount of the interim dividend. The act complained of was ultra vires, and there must be an order on the defendant directors to replace the 127*l.* 10*s.*, with interest at 4 per cent. But his Lordship understood that the company had lately had a windfall which at the end of the year would enable the whole of the deficit to be made up, and he thought that the accounts might be put in a form which would render it unnecessary to have the 127*l.* 10*s.* actually repaid. The order must not, therefore, be acted on until after the next general meeting. Thereupon the plaintiffs submitted to judgment upon the

counter-claim, and his Lordship accordingly gave judgment for the defendants on their counter-claim for the portions of dividend received by the plaintiffs, but directed that this order should be stayed in like manner.

The judgment as drawn up declared that the resolution for payment of the interim dividend, and the payment of the dividend, were respectively ultra vires, and that the defendants Alexander and Wood were jointly and severally liable to make good the 127*l.* 10*s.* to the company; and those defendants were ordered to pay to the defendant company that sum, with interest at 4 per cent., but that order was not to be acted upon until after the next general meeting of the company, and not then if credit should be taken in the balance-sheet for such moneys and the same should be treated as a payment on account of dividend to be declared at such general meeting; and upon the counter-claim it was ordered that the plaintiffs should repay to the company the dividends received by them respectively, with interest at 4 per cent., that order being stayed in like manner as aforesaid. The costs of the action and counter-claim to be taxed and set off.

The defendants Alexander and Wood appealed from the whole of the judgment.

The appeal was heard on February 29 and March 1, 1904.

Eve, K.C., and *Ashton Cross*, for the defendants. It is submitted (1.) that the plaintiffs cannot maintain the action, and (2.) that under the circumstances there is no liability to refund.

(1.) Though a shareholder may maintain an action to restrain a company and its directors from doing an ultra vires act, yet a shareholder cannot maintain an action to recover money wrongfully paid when he has himself received a part of it. There is certainly no case reported in which such an action has been maintained. For this purpose the action must be treated as if it were brought by the two named plaintiffs alone. As a general rule, in an action to restrain directors from doing an ultra vires act the company ought to be the plaintiff. But a shareholder may sue if, e.g., he is overborne by a majority,

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so that the company will not sue: *Foss* v. *Harbottle* (1); *Russell* v. *Wakefield Waterworks Co.* (2) If the present plaintiffs had been misled by the directors into supposing that there were profits available to pay the dividend, they might maintain the action. But it is clear that the plaintiffs knew all the facts, and, that being so, they, having received part of the money which is alleged to have been wrongly paid, cannot maintain the action: *In re Alexandra Palace Co.* (3); *Flitcroft's Case.* (4) In the latter case it was held that a company could sue in respect of an ultra vires payment of dividends, even though the shareholders had ratified the payment with knowledge of the facts. But Brett L.J. said (5): "If they" (the shareholders) "had with full knowledge assumed to ratify what was done, they could not individually have complained." The directors would be entitled to an indemnity from the shareholders who with knowledge assented to the illegal act: *Moxham* v. *Grant* (6); *Ramskill* v. *Edwards.* (7)

Secondly, the plaintiffs have acquiesced in all that has been done; in fact Towers himself sent out the dividend without any protest, and Wedlake himself seconded the resolution at the shareholders' meeting on September 14, 1900, adopting the balance-sheet which recorded the payment of the dividend. Moreover, not only had they both their portions of the dividend in their pockets when they brought this action, but they have waited for two years and a half before bringing the action.

Norton, K.C., and *Frank Evans*, for the plaintiffs. This action is in the proper form, it being an action to render directors liable for a breach of duty committed by them as fiduciary donees of the powers vested in them by the company's articles: *Alexander* v. *Automatic Telephone Co.* (8) Mere knowledge of the facts is not sufficient to debar the plaintiffs from maintaining this action, for the shareholders could not ratify the payment of a dividend out of capital,

(1) (1843) 2 Hare, 461; 62 R. R. 185.
(2) (1875) L. R. 20 Eq. 474.
(3) (1882) 21 Ch. D. 149, 161.
(4) (1882) 21 Ch. D. 519.
(5) 21 Ch. D. 535.
(6) [1899] 1 Q. B. 480; [1900] 1 Q. B. 88.
(7) (1885) 31 Ch. D. 100.
(8) [1900] 2 Ch. 56, 69, 72.

that being an act altogether ultra vires of the company or the directors: it was a nullity in law, and therefore incapable of ratification; nor is lapse of time an obstacle to the relief we claim: *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (1)

[COZENS-HARDY L.J. It is clear that an ultra vires act cannot be ratified even by the sanction of every shareholder in the company: *Flitcroft's Case.* (2)]

In re Alexandra Palace Co. (3), relied on by the defendants, is a different case, for there the application was by the liquidator in a winding-up.

Whatever may be said as to the right of the plaintiff Towers to maintain the action, at all events Wedlake is a good plaintiff, for he never signed the resolution for payment of the dividend, and in fact his statement in paragraph 14 of the statement of claim that he was neither consulted as to nor took part in the payment is not denied by the defendants.

VAUGHAN WILLIAMS L.J. On the whole I do not think the plaintiffs are entitled to any relief. It would not be very satisfactory if we had to determine this case ultimately upon the pleadings. I quite feel the force of what Mr. Evans said as to there being the allegation in paragraph 14 of the statement of claim that "the plaintiff Wedlake was never consulted as to or took part in the declaration or payment of the said 5 per cent. dividend," and as to there being in the defence no denial of that allegation. But, even treating the allegation as admitted, that does not seem to me to dispose of the whole case, for the truth of the matter is that that allegation is quite consistent with Wedlake having received this dividend with full knowledge of all the facts. If that is so, the matters alleged in paragraph 14 do not in any way negative the incapacity of the plaintiff Wedlake to sue in this action. It is, in all probability, true that, although Wedlake may not have been consulted as to the declaration and payment, he was perfectly well aware of all that was being done; and that is strongly confirmed by the fact that the counter-claim alleges that the dividend paid to

(1) (1875) L. R. 7 H. L. 653, 672. (2) 21 Ch. D. 519, 533.
(3) 21 Ch. D. 149.

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the plaintiffs on their then holdings amounted to so and so, giving the figure, which "the plaintiffs took and have ever since retained with full notice of all the facts relating thereto." I believe that that allegation is true, for not only do the plaintiffs seem to me, on the face of the pleadings, to admit the truth of the allegation, but also when one turns to the minute-book and looks at the minutes, and in particular the minutes of the meetings of September 14, 1900, at both of which Mr. Wedlake was present, I cannot doubt that he must have been perfectly well aware of all the facts connected with the declaration and payment of this dividend, and with the state of the accounts at the time.

In that state of things, what ought to be done with this action? There is no doubt that the payment of this interim dividend was an ultra vires payment. I start with the assumption one is bound to make, that if an act is done by a company which is ultra vires, no confirmation by shareholders—not even by every member of the company—can convert that which was ultra vires into something intra vires: it always must be ultra vires. As is pointed out in one or two of the cases, the result of that is that if the company are plaintiffs, no amount of acquiescence or resolutions by the shareholders can form an answer to the action by the company for the reinstatement of things in the position in which they would have been but for the ultra vires act complained of. But, to my mind, it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. I am assuming this case to be one of those in which the facts have been such that an individual shareholder ought to be able to sue in a representative action for the purpose of preventing acts being done in reference to the company in which the shareholders are interested, and which might damnify the company by reason of those acts being ultra vires. I assume that an action not only to prevent ultra vires acts in the future but also to remedy acts that have been done ultra vires is an action which can be brought in the form in which this action is brought. But although that is so, my own opinion is that this is a kind of action which has to be brought

by a plaintiff personally. It is an action which he cannot bring unless he has an interest; it is an action which a stranger could not bring.

Under those circumstances, what is it we have to ask ourselves here? If it be the fact, as I think it is, that these plaintiffs knew of all that had been done, received their dividends with knowledge of all the facts, and then brought this action with the money still in their pockets, ought they to be allowed to bring this action, which, as I have pointed out, is, to my mind, an action such as they can bring in consequence of their personal interest in the matter? I think not. I think that an action cannot be brought by an individual shareholder complaining of an act which is ultra vires if he himself has in his pocket at the time he brings the action some of the proceeds of that very ultra vires act. Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say he ought not to bring such an action equally requires us to say that he ought not to be the peg upon which such an action is to be hung for the benefit of others.

Assuming that to be so, what answer is sought to be made here? I think Mr. Evans was disposed to put the only logical answer that could be put, and to say he was bound to contend that the very wrong-doer himself, who had the proceeds of the wrong-doing in his own pocket, might, if the matter was one which was ultra vires, sue as a plaintiff to have it put right, and might bring his action against the other shareholders who had benefited by it to compel them to restore the capital which had been wrongfully paid out to them. But I do not think that is right; and if it is not right, I think that even the return of the capital after the action has been brought and before the trial does not make things any better. Admittedly, these dividends were still in the pockets of these plaintiffs when they brought this action; they were still in their pockets when the action came to be tried. It is quite true that in the course of the trial they said they were prepared to pay this money back, and in the result they were content that judgment should go against them personally in respect of it; but I do not think

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that would make an action good which was not otherwise a good action in its inception.

I must say in this particular case there is a strong inclination in my mind not to give the plaintiffs the relief which they ask, because, starting with the fact that capital had been distributed in the payment of this interim dividend, that fact had been recognised by the company and by the shareholders: it appears on the face of the balance-sheet, and they were minded to replace this capital, and had every prospect of completely replacing it out of the profits of the very year in which this action was brought.

Under those circumstances this action was wholly unnecessary and wholly uncalled for. It seems to me the Court is not bound, when it sees that this ultra vires act is in course of being put right, and will very shortly be put right, to give relief to a plaintiff who has acquiesced in the wrong, and who himself has part of the proceeds of the wrong in his pocket. Under those circumstances I think this appeal ought to succeed.

STIRLING L.J. I also think this appeal ought to succeed. I desire to rest my decision on the particular facts in this case, and to abstain from laying down, so far as possible, any general rule on the question whether a shareholder, who has been party to the payment of a dividend out of capital, or who has taken his dividend with knowledge of all the facts, can or cannot come to the Court afterwards and complain that the dividend has been paid out of capital, and seek to make either the directors or his fellow shareholders restore what they have paid or received with notice that the dividend had been improperly paid.

Now the facts are these. [His Lordship then referred to the balance-sheets for 1899 and 1900, to the payment of the interim dividend, and to the auditor's report of August 28, 1900, and continued:—]

Now the balance-sheet for the year ending July 31, 1900, is submitted to the shareholders and is approved by them; therefore it stands recorded on the face of the transactions of

the company that a dividend has been improperly paid, and in any future dealing, supposing it to be honest, the debit against the company has to be wiped out before any dividend can be properly paid. [His Lordship then, after referring to the result of the balance-sheets of 1901 and 1902, and to the plaintiff Towers' dismissal on March 12, 1903, proceeded:—]

Thereupon, on March 20 following, Mr. Towers and one of the directors, Mr. Wedlake, bring this action, and they charge that an ultra vires act has been committed, and that the 127*l.* 10*s.* which had been made and had been lost by the company ought to be brought back into the coffers of the company; and that is the object of this action.

It is proved beyond all contradiction by documents under the hand of Mr. Towers that he was perfectly well aware of the circumstances in which the dividend was paid. It is true that Mr. Wedlake was not in the same position as Mr. Towers; but I think, having regard to the admissions which he made by not denying the allegation in the counterclaim—that he received his dividend "with full notice of all the facts relating thereto"—and to the fact of his having submitted to judgment against himself on that footing, and also having regard to the high probabilities of the case, that, inasmuch as he did not choose to go into the box and deny it, we ought to assume that he, like his partner Mr. Towers, knew the circumstances in which the dividend was declared.

Now the action is one by the plaintiffs on behalf of themselves and all other shareholders against the company; originally all the shareholders were not made parties, but the other shareholders were afterwards, at their own request, made defendants, so that now we have here all the shareholders of the company. I think this is a form of action which in certain circumstances may be maintained. That a shareholder who had received a dividend, without knowing anything of the illegality of it, might maintain such an action I do not doubt. Whether in some circumstances a shareholder so suing ought not to return what he had received in respect of dividend is another question. Why is it that this form of action is allowed? Primâ facie the proper plaintiff, where it is sought to bring back the

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property of the company into its own coffers, is the company itself. But there are exceptions to that rule; and what is the reason of the exceptions? Sir George Jessel, in the case which has been referred to of *Russell* v. *Wakefield Waterworks Co.* (1), says this: "The exceptions turn very much on the necessity of the case; that is, the necessity for the Court doing justice." Now this is a case in which, to begin with, no one suggests any fraud or dishonesty on the part of the directors or any one else. The directors who paid the dividend made a mistake, but no one charges them with anything more than a mistake. Everything was perfectly open. The fact was disclosed by the balance-sheet of 1900, the first balance-sheet which was submitted to the shareholders after the payment of the dividend. Further, the subsequent dealings seem to shew that the company did not intend to overlook the fact that this dividend had been improperly paid, or that there was an intention on the part of any one to do anything other than what was right, by making good the deficiency in the capital of the company which had been created by the payment of that dividend. That seems to me to have been the result of the subsequent balance-sheets. Moreover, what do we find the plaintiffs themselves doing? They acquiesce in this course being taken by the company from September 14, 1900, when they certainly knew it, down to March 20, 1903, when this action was brought. It does not seem to have ever been suggested by any one that an action should be brought by the company to recover the deficiency of the capital; and I think we ought to infer that what commended itself to the plaintiffs, as well as to the other shareholders, was to go on in this way; the company was prosperous, it was wiping out year by year a great part of the deficiency, and the intention was ultimately, when the whole deficiency, including the deficiency in capital, had been replaced, to pay a proper dividend, and not until then. I do not think there was any necessity shewn, looking at all the circumstances of the case, for the intervention of the Court to compel the payment of this small sum—for such it really was—in the way the plaintiffs

(1) L. R. 20 Eq. 480.

seek. In truth, Byrne J., although he gave a judgment in favour of the plaintiffs, was so far from desiring to press it, that he directed it not to be enforced, in order to see what might be the result of the further trading, and whether the deficiency in capital would not be wiped out in the ordinary course.

I think, on the whole, that justice would have been done if this action had been dismissed on the ground that the personal conduct of the plaintiffs was such as to preclude them from insisting on the relief which they claim.

COZENS-HARDY L.J. I am of the same opinion. In my view there is one point here which really admits of no argument, namely, that this was an illegal payment as being a payment out of capital. Nor do I think that it can be contested—and it certainly was not contested by Mr. Eve—that a transaction of that kind cannot be ratified by the shareholders. But, in order to consider what is relevant in this case, one must go further. An action in respect of or arising out of an ultra vires transaction ought properly to be brought by the company; but it has long been well established that there are cases in which such an action may be maintained by a shareholder suing on behalf of himself and all other shareholders against the company as defendants. I will not pause to consider under what particular circumstances such an action may be maintained, but I assume that this is one of those cases in which such an action may be maintained—I mean in point of form. But I think it is equally clear that the action cannot be maintained by a common informer. A plaintiff in an action in this form must be a person who is really interested. When you get that fact clearly established it seems to me impossible to avoid taking the next step—that all personal objections against the individual plaintiff must be gone into and considered before relief can be granted. Here I think it is clearly proved, as it is certainly to be treated as admitted by the absence of any denial of the allegations in the counter-claim, that both the plaintiffs took this dividend with full notice of all the facts relating thereto. It is also clear

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that they had their dividends, which they took with full notice that they were payments out of capital, in their pockets at the date this action was commenced.

Now, can a shareholder who has, with full notice of all the material facts, received part of the capital by way of a dividend, and who still retains that money in his pocket, maintain an action against the directors who have paid the dividend? I think the true answer to that question is, He cannot. It may be that there is no direct authority on the point; but the dictum of Brett L.J. in *Flitcroft's Case* (1) is very nearly in point. That was the case of the winding-up of a company: it was a case where there had been an illegal payment of capital; and what Brett L.J. says is this: "I think there was no ratification at all, because the assent of the shareholders was procured by improper accounts, the untruthfulness of which the shareholders did not know. But suppose they had known it, I think that what was done was a breach of trust which they could not ratify. If they had with full knowledge assumed to ratify what was done, they could not individually have complained, but the shareholders are not the corporation."

The view of Brett L.J. was that shareholders who assumed to ratify could not have individually complained; and it seems to me to follow that a shareholder, having the money in his pocket which he knows is wrongfully there, ought not to be allowed to complain; and he cannot get any greater right of complaint because his action is, in form, an action by himself and all other the shareholders in the company. In fact, he must succeed by his own merits and not by the merits of the other shareholders. Whether this action could have been maintained by these plaintiffs if, before action brought, they had repaid the amount of the dividend which they had received, it is not necessary for us to decide. Speaking for myself, I doubt whether that payment could have sufficed to put the plaintiffs in the right. Here, however, nothing of the kind happened: there is actually a judgment against the plaintiffs upon the counter-claim for payment of these sums.

(1) 21 Ch. D. 519, 534-5.

In my view the judgment of the learned judge in the action ought to be set aside, the judgment on the counter-claim, with costs, being the only part of the order which can stand.

VAUGHAN WILLIAMS L.J. The only part of the order of the Court below which stands is that which relates to the counter-claim. The defendants to the counter-claim (that is, the plaintiffs) will have to pay the costs of that, but in the action and on the appeal there will be no costs at all on either side.

Solicitors: *Gibson & Weldon, for Hannay & Hannay, South Shields; Smith, Rundell & Dods, for H. Wilson Paton, Swansea.*

G. I. F. C.

In re FITZGERALD. SURMAN *v.* FITZGERALD.

[1901 F. 1499.]

Conflict of Laws—Domicil—Matrimonial Domicil—English Husband and Scotch Wife—Marriage Contract in Scotch Form—Settlement of Wife's Property—Real Estate in Scotland—Inalienable Life Interest given to Husband—"Alimentary Provision"—Validity of Restriction as against Husband's Mortgagees—Repugnancy—Public Policy.

The rule that the law of the matrimonial domicil applies to a contract in consideration of marriage will yield to an express stipulation that some other law shall apply, or to other sufficient indications that the parties contracted with reference to some other law.

Scotch "heritable bonds" must be regarded by an English Court as immovable property and therefore governed by Scotch law.

When it is said that a contract, valid by the law of the country in which it is made, cannot be enforced in England because it is contrary to public policy or the policy of English law, it is meant that the contract conflicts with what are deemed in England to be essential public or moral interests—not merely that it would be invalid under English law.

On the marriage in Scotland of a domiciled Englishman with a domiciled Scotswoman the wife's property, which consisted mainly of Scotch heritable bonds, was settled by a marriage contract executed in Scotland in Scotch form. By this contract the trustees, most of whom were domiciled Englishmen, and who were also the trustees of a contemporaneous settlement of the husband's property in English form, were to hold the wife's

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property upon trust, in case the husband should survive the wife, to pay the income to him during his life, declaring that all payments to him "shall be strictly alimentary, and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors." The husband survived the wife, having mortgaged his life interest under the Scotch contract to mortgagees in England. He had always retained his English domicil.

By the law of Scotland such a restricted life interest, so far as it does not exceed in amount a reasonable provision, is valid as against creditors, other than "alimentary" creditors, and in such a case, if the husband fails to maintain the children of the marriage, they are entitled to attach the alimentary provision made for him.

Upon a summons by the trustees to determine the rights of the mortgagees as against the husband and the only child of the marriage:—

Held (by Vaughan Williams and Cozens-Hardy L.JJ.), that, having regard to all the circumstances and particularly the nature of the limitations in the Scotch contract, it must be taken to have been the intention of the parties that that contract should be governed, not by the law of the English matrimonial domicil, but by Scotch law, and that the "alimentary provision" to the husband, being valid by that law, must be treated as valid by the English Courts, and consequently valid as against the husband's mortgagees, there being nothing in the provision contrary to the policy of English law in the proper sense of that term:

Held, by Stirling L.J., that, though the husband and wife had contracted that their rights in her property should be regulated by Scotch law, and it was the duty of the trustees to pay the "alimentary provision" from time to time as it became payable into his hands, regardless of incumbrances created by him, yet an assignment by him of the "alimentary provision" in favour of a domiciled Englishman ought to be held by an English Court to bind funds coming in respect of that provision to the assignor's hands within the jurisdiction of that Court.

Decision of Joyce J., [1903] 1 Ch. 933, reversed.

APPEAL from the decision of Joyce J. (1), the question being whether a restraint on the right of alienation of a life interest, given to a husband in his wife's property by a marriage contract in Scotch form, was valid as against his incumbrancers in England.

By a settlement in English form, dated September 20, 1862, and made in contemplation of the marriage of Sir Gerald Vesey Fitzgerald with Miss Lockhart, Sir Gerald's father covenanted with the trustees that his heirs, executors or administrators would, within six months after his death, pay to the trustees the sum of 6000*l.*, to be held by them upon

(1) [1903] 1 Ch. 933.

trust for investment as therein mentioned, and to pay the income of the trust fund to Sir Gerald and his assigns during his life, and after his death to Lady Fitzgerald during her life, and after the death of the survivor to stand possessed of the trust fund in trust for the issue of the intended marriage as therein declared.

By this deed Sir Gerald also assigned to the trustees a policy of insurance for 4000*l.* upon his own life to be held by them upon the same trust.

On the same day a marriage contract in Scotch form was executed by Sir Gerald and Miss Lockhart, whereby, after a recital of the English settlement and in consideration of the provisions therein contained, Miss Lockhart assigned, conveyed, disposed, and made over to the trustees of the English settlement all and sundry lands and heritages, goods, gear, debts, and sums of money, and generally her whole property heritable and movable (with certain specified small exceptions), to be held by the trustees in trust for the ends, uses, and purposes after mentioned, namely: "first, for payment of the expenses of executing this trust; second, for payment of the free annual proceeds of the trust estate" to Miss Lockhart "during all the days of her life, and that on her own receipt alone exclusive of the jus mariti and right of administration" of Sir Gerald. "Third, in case the said Sir Gerald shall be the survivor of the spouses, for payment of the whole free annual proceeds of the estate to him during all the days of his life after the death of" Miss Lockhart, "declaring that all payments to the said Sir Gerald shall be strictly alimentary, and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors. Fourth, on the death of the survivor of the said spouses the trustees shall pay over or assign the whole trust funds and estate in their hands" to the child or children of the marriage as therein mentioned.

Both deeds were executed in Scotland.

On September 23, 1862, the marriage was solemnized in Scotland. At the time of the execution of the deed Sir Gerald was domiciled and resident in England and Miss Lockhart was domiciled and resident in Scotland. After the celebration of

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the marriage Sir Gerald continued to reside in England and retained his English domicil. The original trustees of the settlements (six in number) were (with one exception) Englishmen resident in England. At the time when the summons before Joyce J. was issued all the then trustees were Englishmen resident in England.

The funds originally comprised in the Scotch contract consisted of two Scotch heritable bonds for the respective sums of 6000*l.* and 7200*l.*, which were secured upon heritable or immovable property in Scotland, and a sum of 500*l.* cash, which was paid over to the trustees for investment, and was invested by them in Consols. The heritable bonds were assigned to the trustees by a separate deed. At the time when the summons was issued the investment of part of the 7200*l.* had been changed into English securities. By Scotch law heritable bonds of this character are treated as real estate, except for certain purposes specified in the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 117.

There was only one child of the marriage, a daughter, born on June 19, 1863.

Lady Fitzgerald died on May 16, 1901.

Between the years 1863 and 1901 Sir Gerald and Lady Fitzgerald created in England various incumbrances upon their respective interests under the English and Scotch settlements, in some of which Miss Fitzgerald also joined.

Subsequently Sir Gerald further incumbered his life interest under the two settlements. The defendant Colonel Harford was the first mortgagee of Sir Gerald's life interest under the Scotch settlement.

On October 12, 1901, the summons was taken out by the trustees, who were all then domiciled in England, asking (inter alia) for the determination of the question whether Sir Gerald was entitled for his life to the income of the trust funds comprised in the Scotch marriage contract free from incumbrance and without power of alienation, or who was now entitled to the income.

An affidavit was made by Mr. Graham Murray, formerly Lord Advocate of Scotland, in which he said: "By the law of

Scotland it is possible for a person to create a life interest in favour of another person, and, by declaring that life-rent to be alimentary, to exclude, so far as the life interest does not exceed in amount a reasonable provision, the diligence of ordinary creditors, and restrain all power of anticipation. Where, therefore, as here, a lady by ante-nuptial marriage contract conveys her funds to trustees, it is possible for her to create a life-rent of these funds in favour of her surviving husband, and to exclude his ordinary creditors and to restrain him from anticipation."

There was also evidence that by Scotch law "alimentary" creditors of the husband could arrest the alimentary provision, but that no other creditors could do so; and also that, if in the case of such an alimentary provision the husband failed to maintain the children of the marriage, they would be entitled to attach the alimentary provision made for him.

Joyce J. held that, even if the construction and effect of the Scotch contract were properly determinable by the law of Scotland, its validity and operation must be determined by the law of England; and that, inasmuch as the prohibition of alienation of the alimentary provision was, according to English law, repugnant and contrary to public policy, the husband's mortgagees were entitled to receive payment of the income from the trustees.

A question also arose with reference to a policy of assurance which had been substituted for the policy comprised in the English settlement, but the facts relating to that question are immaterial for the purpose of this report.

Sir Gerald appealed.

A. H. Jessel, for Sir Gerald Fitzgerald. The marriage contract is a Scotch contract, and the limitations in it are in the Scotch, not the English, form. According to the evidence of the Scotch lawyers it is a Scotch instrument, and in fact it is admitted to be so by the late Lord Advocate in his affidavit. Also the bulk of the trust funds was originally invested in Scotch heritable bonds. A partial change of investment subsequently took place.

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[VAUGHAN WILLIAMS L.J. To ascertain whether this is a Scotch settlement the matter for consideration is, what was the nature of the settled property at the time of the execution of the settlement. What was done afterwards with the property is, for this purpose, immaterial.]

This then being a Scotch settlement, the interest taken by the husband in his wife's property during his life is "strictly alimentary." It corresponds to what in an English settlement would be a discretionary power in the trustees to pay the income to the husband during his life. That is in no way contrary to public policy. The trust is for the husband, the children, and the alimentary creditors—that is, the persons who supply goods for the husband and children. It is a trust, as the expert evidence shews, "in the ordinary Scotch form."

Being a Scotch settlement executed in Scotland, it should be construed according to the law of Scotland, for the rule in such cases is that the law of the place where the contract was made should govern the construction of the contract: *Corbet* v. *Waddell* (1); *Chamberlain* v. *Napier*. (2) The husband's domicil is immaterial.

The primâ facie rule is that, if there is no contract, the domicil governs the rights of the parties; if there is a contract then, according to the decisions of the English Courts, the form of the contract is the governing consideration.

[COZENS-HARDY L.J. In Dicey's Conflict of Laws it is said (rule 172, sub-rule 1, p. 653) that "a marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicil."]

But that should be read in connection with sub-rule 2, p. 654, that "the parties may make it part of the contract or settlement that their rights shall be subject to some other law than the law of matrimonial domicil, in which case their rights will be determined with reference to such other law." And, on p. 652, the rule is confined to "movables." With regard to "immovables," the effect of the contract is governed by "the proper law" of the country where they are situate:

(1) (1879) 7 R. 200, 208. (2) (1880) 15 Ch. D. 614, 633.

pp. 586, 588; meaning the law to which the parties intended, or may fairly be presumed to have intended, to submit themselves: pp. 540, 586. The form of the instrument is in itself very strong evidence of intention that the law of the country in which it is operative is to govern the construction. The intention of the parties, when not expressed, is to be inferred from the terms and nature of the contract and from the circumstances of the case: p. 568. The authorities are in accordance with that view: *In re Barnard* (1); *In re Mégret* (2); *Viditz* v. *O'Hagan* (3), the decision in which, though reversed by the Court of Appeal, was not reversed on this point (4); *In re Bankes.* (5) The rights of husband and wife in each other's movables are determined by the matrimonial domicil only where there is no marriage contract or settlement: Dicey, p. 649.

Another point is this. The learned judge has said that, even assuming this to be a Scotch settlement, the money in question is income—cash come into the hands of the trustees in England; and that therefore he is entitled to override the intention of the parties and say that this clause is against public policy and therefore void. But that is contrary to the decision and the reasoning of Lord Selborne L.C. in *Harrison* v. *Harrison* (6), where he gave effect to the Scotch law, and excluded any doctrine of the English law.

[COZENS-HARDY L.J. That case dealt with Scotch real estate.]

Scotch heritable bonds are real estate.

Joyce J. relied principally upon *Noel* v. *Robinson.* (7) But *Harrison* v. *Harrison* (6) is inconsistent with that case.

Scott v. *Allnutt* (8), which also had apparently great weight with the learned judge, is distinguishable, for there Lord Elibank, the son, had a life estate vested in him, which is not the case here, the husband's interest being only an interest for alimentary purposes.

(1) (1887) 56 L. T. 9.
(2) [1901] 1 Ch. 547.
(3) [1899] 2 Ch. 569.
(4) Vide [1900] 2 Ch. 87.
(5) [1902] 2 Ch. 333.
(6) (1873) L. R. 8 Ch. 342, 348.
(7) (1682, 1687) 2 Vent. 358; 1 Vern. 90, 453, 460, 469.
(8) (1831) 2 Dow & C. 404.

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Again, the rule which the learned judge quoted from Westlake's Private International Law, 3rd ed. p. 71 (not "76"), s. 39—that the legality and operation of a marriage settlement or contract, when the meaning has been ascertained, and generally its interpretation also, will be referred to the matrimonial domicil—is wrong. *In re Barnard* (1) goes beyond the proposition, and *Anstruther* v. *Adair* (2) negatives it. It is also opposed to Foote's Private International Jurisprudence, 2nd ed. pp. 315 et seq., and Story's Conflict of Laws, s. 276, in both of which works the rule is properly stated. The learned judge also referred to Vaizey on Settlements, pp. 1640 et seq., but the learned author merely cites Westlake as his authority. He says the presumption that the law of the matrimonial domicil is the guide "may" yield to indications that the law of the place where the contract is made was intended; but it is submitted that the authorities are precise, that it "shall" yield to that law. The question how far the law of matrimonial domicil regulates the right of the husband in movables is dealt with in Westlake, s. 36, p. 68, and following sections.

It is not contrary to public policy that a wife should stipulate for the settlement of her property as against her husband's creditors. It is not against public policy that the children of Scotch people should be provided for as against their parent's creditors. It is submitted that the learned judge has misinterpreted this instrument, and that he should not have applied English law to it.

Badcock, *K.C.*, and *T. T. Method*, for Colonel Harford. There is no such thing known to English law as a life interest given to a man subject to a restraint on anticipation. An Englishman cannot settle his vested interest in property so as to place it beyond the reach of his creditors. If property is given to a man for his life the donor cannot take away the incidents to a life estate, for to do so would be contrary to public policy: *Graves* v. *Dolphin* (3); *Brandon* v. *Robinson* (4); *Foley* v. *Burnell.* (5) It is contrary to the policy of the law

(1) 56 L. T. 9.
(2) (1834) 2 My. & K. 513; 39 R. R. 263.
(3) (1826) 1 Sim. 66; 27 R. R. 166.
(4) (1811) 18 Ves. 429, 433; 11 R. R. 226.
(5) (1783) 1 Bro. C. C. 274.

that a man shall have property with which he cannot deal. All those cases decide that a man cannot have a life estate with a restraint on anticipation: all that can be done is to give him an interest until alienation. An Englishman cannot, by going to Scotland and marrying there, come back to England and set his creditors at defiance. It is submitted that an English Court will not give effect to a gift to a man of a life estate freed from the power of alienation. Reliance is placed on the lex fori, which is the main point in this case. The trustees have come to an English forum, and therefore the question must be decided according to English law. The rule is thus stated in Dicey, rule 172, sub-rule 1, p. 653: "A marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicil." Then, under sub-rule 2, the parties may make it part of the contract that their rights shall be subject to some other law than that of the matrimonial domicil.

[COZENS-HARDY L.J. Note 1 on p. 674 says that the same result will follow if it can be "fairly inferred" from the terms of the contract that the intention of the parties, though not expressed, was that it should be construed with reference to some other law than that of the matrimonial domicil.]

Colliss v. *Hector* (1) is an illustration of that.

[COZENS-HARDY L.J. referred to *Este* v. *Smyth*. (2)]

That a gift to a man for life with a restraint on alienation is repugnant and void: see *Younghusband* v. *Gisborne*. (3) It is so whether the transaction is carried out by giving him the property or by creating a trust: *Davidson* v. *Chalmers*. (4) An English Court will not enforce a right otherwise duly acquired under the law of a foreign country when the enforcement would be inconsistent with the policy of English law: Dicey's Conflict of Laws, p. 32. In *Brook* v. *Brook* (5) Lord Campbell L.C. said: "It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be

(1) (1875) L. R. 19 Eq. 334.
(2) (1854) 18 Beav. 112.
(3) (1844) 1 Coll. 400; 66 R. R. 120.
(4) (1864) 33 Beav. 653.
(5) (1861) 9 H. L. C. 193, 212.

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performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions." And at p. 218: "Some American decisions, cited on behalf of the appellants, remain to be noticed. In *Greenwood* v. *Curtis* (1) the general doctrine was acted upon that a contract, valid in a foreign State, may be enforced in a State in which it would not be valid, but with this important qualification, 'Unless the enforcing of it should hold out a bad example to the citizens of the State in which it is to be enforced.' Now the Legislature of England, whether wisely or not, considers the marriage of a man with the sister of his deceased wife 'contrary to God's law,' and of bad example." To restrain a man from anticipating his income in order to prejudice his creditors would be "holding out a bad example."

When a woman is restrained from anticipation her separate interest is the creation of a Court of Equity, and can be moulded as that Court pleases. That is also the case where lunatics are concerned, but it does not apply to sane men of full age. In this case there is a conflict between Scottish law and the status of persons in England, which is one of the five classes given in Dicey's Conflict of Laws at p. 34. No Englishman can give himself the capacity to acquire such a right as this.

This is not a gift by will, which might perhaps be governed by the law of the testator's domicil. It is a contract; and it is not admitted that it was a Scottish contract, for the parties had an English matrimonial domicil in contemplation. An Englishman may agree that his rights shall be regulated by foreign law, provided that the rights thus conferred do not offend against English law, but if he contracts with a view to residence in England he cannot contract himself out of English law.

If the decision of the learned judge is reversed, it will in future only be necessary to say that a restriction on alienation shall be an "alimentary" interest according to the law of Scotland, and it must be supported.

(1) (1810) 6 Mass. 358.

[STIRLING L.J. referred to *In re Mégret.* (1)]

An English Court will not enforce a bargain which is contrary to the policy of English law: *Hope* v. *Hope* (2); *Grell* v. *Levy* (3); *Rousillon* v. *Rousillon* (4); *Sottomayor* v. *De Barros* (5); *In re Bankes.* (6) The Court will not allow foreign law to be used so as to cause injustice: *Lord Cranstown* v. *Johnston.* (7)

[COZENS-HARDY L.J. referred to *Freke* v. *Lord Carbery.* (8)]

There is no doubt of the jurisdiction of the English Courts: *Ex parte Pollard.* (9) This question arises with regard to arrears of interest and income. It is not material that some of the money is derived from heritable bonds which in Scotland are considered immovables: *Scott* v. *Allnutt.* (10) The settlement was framed as a settlement of personal property. There is no action in rem. The reasonable inference here is that the parties intended the law of the matrimonial domicil to apply. They have not contracted themselves out of that law. And, so far from there being any evidence of an intention that the Scotch law should apply, Sir Gerald himself says in his affidavit that he always supposed he had power to mortgage his interest. If the law is doubtful it is not safe to impute to the parties an intention which they have not expressed.

It has been said that the daughter has an interest in the "alimentary" provision for her father; if so, she is capable of parting with that interest, and she has in fact joined in some of the mortgages.

No doubt real estate in Scotland must be governed by the law of Scotland, and a Scotch heritable bond is according to that law real estate. But it is quite another question whether such a bond is "immovable" property according to international law: Foote's Private International Jurisprudence, 2nd ed. pp. 184, 187, 189. If a heritable bond is given as security for a debt, the debt by its nature is movable whatever may be the security given for it.

(1) [1901] 1 Ch. 547.
(2) (1857) 8 D. M. & G. 731.
(3) (1864) 16 C. B. (N.S.) 73.
(4) (1880) 14 Ch. D. 351.
(5) (1877) 3 P. D. 1.
(6) [1902] 2 Ch. 333.
(7) (1796) 3 Ves. 170; 3 R. R. 80.
(8) (1873) L. R. 16 Eq. 461.
(9) (1840) Mont. & Ch. 239, 251.
(10) 2 Dow & C. 404.

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[*Jessel* referred to Dicey's Conflict of Laws, p. 514, as shewing that the lex situs of the land charged by a bond determines the character of the bond: *Jerningham* v. *Herbert.* (1)]

In *Duncan* v. *Lawson* (2) it was held that leaseholds in England, belonging to a domiciled Scotsman, devolve in case of his intestacy upon the persons entitled under the English Statute of Distributions.

[COZENS-HARDY L.J. referred to *Freke* v. *Lord Carbery.* (3)]

The question depends on the nature of the property, not on the law of the country. A debt, whatever may be the security for it, is in its nature movable. The money due on a Scotch heritable bond will pass by the will of a domiciled Englishman: *Duchess of Buccleugh* v. *Hoare* (4); *Johnstone* v. *Baker.* (5)

There has been some alteration in the law of Scotland since those cases.

[COZENS-HARDY L.J. A Scotch heritable bond now stands in a position similar to that of a leasehold in England. But suppose it were Scotch real estate?]

In that case the question would arise whether the provisions of the settlement could be enforced in England as being contrary to English law.

But the Court is now dealing with the income of a fund.

In *Scott* v. *Allnutt* (6) entailed land in Scotland was sold for redemption of the land tax, and the surplus proceeds were invested in the names of trustees, who were to pay the interest to the heir of entail in possession until the money should be reinvested in land. It was held by the House of Lords that an assignment in English form by the next of entail of his contingent reversionary right to the interest was valid, on the ground that the interest was in substance movable.

[COZENS-HARDY L.J. In that case the property was not inalienable by Scotch law.]

But the assignment was not valid by Scotch law, and that is so here.

(1) (1829) 4 Russ. 388; 28 R. R. 136.
(2) (1889) 41 Ch. D. 394.
(3) L. R. 16 Eq. 461.
(4) (1819) 4 Madd. 467.
(5) (1817) 4 Madd. 474, n.
(6) 2 Dow & C. 404.

W. F. Hamilton, K.C., and *W. E. Vernon*, for another incumbrancer. This is not a question as to the carrying out of a covenant, for there is a settlement, and its construction must be determined, not by Scotch law, but by the law of the Court which has jurisdiction over the parties. If there had only been an agreement in the present case the Court would not have carried it out except by a protected life interest in the ordinary form. A man could not settle his own property in this way. In Scotland an alimentary creditor could attach the income in case of non-payment of his debt. The principle must be the same whether it is a life interest or an absolute interest; in either case a man cannot be deprived of the power of alienation. This limitation is either a condition as to the enjoyment of the property, or a restriction upon the capacity of alienation by a person who is under no other restriction. Can that capacity be affected by an instrument executed by a foreigner in a foreign country?

Crossman, for Miss Fitzgerald. The daughter is an alimentary creditor, and the judgment as it stands interferes with her rights. The judgment should be made expressly subject to these rights.

[*Badcock, K.C.*, said that he should not object to that.]

Blakesley, G. R. Northcote, A. H. Withers, and *G. D. Pepys*, for other incumbrancers.

Edward Ford, for the trustees.

A. H. Jessel, in reply. The settlement is a conveyance of Scotch real estate, and as regards that estate it must be governed by the lex situs. A change of investment can make no difference. In determining what is the law of the marriage contract, if any weight is to be attached to the matrimonial domicil, i.e., the domicil of the husband, it may be outweighed by the intention of the parties: *In re Bankes* (1); *Viditz* v. *O'Hagan*. (2) Here the settlement is in the Scotch form, and the nature of it is such that the only possible inference is that the parties intended it to operate according to Scotch law.

[VAUGHAN WILLIAMS L.J. If an English Court came to the conclusion that this particular provision would be inconsistent

(1) [1902] 2 Ch. 333, 343. (2) [1900] 2 Ch. 87.

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with the just rights of creditors, would not the Court refuse to enforce that provision, whatever might be the law governing the settlement ?]

In some cases that might be so, if, e.g., the provision would be contrary to public policy, or injurious to morals, or shocking to the conscience. In the present case there is nothing really contrary to public policy in the proper sense of that term. This inalienable life interest may be contrary to English law, or rather to the rules of equity, but there is nothing in it contrary to public policy. There is nothing immoral or criminal in it: Dicey's Conflict of Laws, pp. 558, 560; *In re Missouri Steamship Co.* (1) *Kaufman* v. *Gerson* (2) governs the present case. In that case the locus contractus was also the locus solutionis, but the principle of the decision applies here. Other cases on the subject are *Janson* v. *Driefontein Consolidated Mines* (3), in which were cited some observations of Parke B. in *Egerton* v. *Earl Brownlow* (4), to the effect that public policy "is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights." See also the observations of Lord Davey to the same effect. (5) An objection to the enforcing of a contract on the ground that it is contrary to public policy must be limited to contracts which involve the doing of a criminal or immoral act: *Printing and Numerical Registering Co.* v. *Sampson* (6); *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (7); *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (8); Westlake's Private International Law, 3rd ed. p. 260. There is nothing contrary to public morality in a contract entered into on marriage that the husband's life interest in his wife's property shall be inalienable by him; there is nothing in the nature of such a contract more immoral than in a limitation to a woman for her separate use without power of anticipation. A Court of Equity will always respect contracts entered into upon marriage. If an executory contract contained a pro-

(1) (1889) 42 Ch. D. 321, 325.
(2) [1903] 2 K. B. 114, 117.
(3) [1902] A. C. 484, 496.
(4) (1853) 4 H. L. C. 1, 123.
(5) [1902] A. C. 500.
(6) (1875) L. R. 19 Eq. 462, 465.
(7) [1892] 3 Ch. 447, 451, 452.
(8) [1893] 1 Ch. 630.

vision contrary to law, the Court would execute it cy-près, so as to carry out as far as possible the intention of the parties. It is no doubt true that the Court of Chancery leans against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest: per Lord Davey in *Wharton* v. *Masterman* (1); but this alimentary provision is valid under Scotch law. In a Scotch Court the restriction would be enforced, and the result ought not to depend upon whether the English or the Scotch jurisdiction is involved. It is submitted that an alimentary creditor of the husband could enforce the trust in an English Court: *Dowse* v. *Gorton*. (2)

Badcock, K.C., referred to Theobald on Wills, 5th ed. p. 441.

Cur. adv. vult.

March 7. COZENS-HARDY L.J. read his judgment as follows:—The first question for consideration on this appeal is whether what I may shortly describe as the Scotch settlement is subject to the law of Scotland, or whether it must be governed by English law. Now this Scotch settlement dealt with the property of a domiciled Scotch lady, who was about to marry a domiciled Englishman, and there is no doubt that the "matrimonial domicil" was English. It is not suggested that a permanent residence in Scotland after the marriage was contemplated. As a general rule the law of the matrimonial domicil is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express stipulation that some other law shall apply. See *Van Grutten* v. *Digby* (3), in which case the matrimonial domicil was French, but the contract, though made in France and void by French law, was nevertheless treated by Sir John Romilly as valid so far as it related to property within the jurisdiction. See also *Viditz* v. *O'Hagan*. (4) The decision in that case was reversed by the Court of Appeal, but not on a ground in any way affecting this point. It is not necessary that there should

(1) [1895] A. C. 186, 198.
(2) [1891] A. C. 190.
(3) (1862) 31 Beav. 561.
(4) [1899] 2 Ch. 569.

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be an express stipulation. It is sufficient if the Court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicil.

Applying these principles to the Scotch settlement, I find several important indications. (*a*) The great bulk of the property, namely, 13,200*l.*, was invested in heritable bonds. It has been settled by a chain of authorities, which ought not now to be reviewed by us, namely, by Grant M.R. in *Johnstone* v. *Baker* (1), by Leach M.R. in *Jerningham* v. *Herbert* (2), and by Wigram V.-C. in *Allen* v. *Anderson* (3), that heritable bonds must be regarded in our Courts as immovables. If so, it can scarcely be denied that the lex loci—i.e., the law of Scotland—must apply to the extent of the 13,200*l.* I am aware that there has been a change of investment of part of this sum into English securities, but this change cannot alter the law applicable to the settlement. I may add that, as to the 13,200*l.*, the matter does not rest in contract. There is an actual completed assignment of the heritable bonds. (*b*) There was, however, 500*l.* cash belonging to the lady, which was paid over to the trustees for investment, and which was, in fact, invested in Consols, although it might have been invested in heritable securities in Scotland. It seems to me that this sum cannot fairly be treated as intended to be subject to a different law from that which is applicable to the bulk of the property. (*c*) The whole frame of the settlement is in Scotch form, and the limitations are of such a nature that they can only take effect if Scotch law is to be applied. I therefore feel bound to treat this as a settlement made in Scotland by a domiciled Scotch lady of Scotch property, in Scotch form, and subject to Scotch law. The trustees of this Scotch settlement must in Scotland follow the Scotch law, and their residence in England, or their English domicil, is irrelevant. This being so, it follows, in my opinion, that we are bound to hold that Sir Gerald Fitzgerald takes such interest, and such interest only, as the Courts in Scotland would declare him entitled to:

(1) 4 Madd. 474, n. (2) 4 Russ. 388; 28 R. R. 136.
(3) (1846) 5 Hare, 163.

Anstruther v. *Adair*. (1) There ought to be no difference in a matter of this kind between the Court of Session and the High Court. The nature and extent of his interest cannot depend upon his domicil, although his capacity to deal with his interest may perhaps depend upon his domicil. To take the somewhat analogous case of a life interest in English property given by the will of a domiciled Englishman for the separate use of a married woman, without power of anticipation, it has never, so far as I am aware, been suggested that the nature and extent of her interest varied according as her domicil was, or was not, English. The trust would be regarded in our Courts as valid and operative, even though by the law of her domicil neither the separate use nor the restraint upon anticipation was recognised. And, on general principles, the same view ought to be adopted by the Courts of the country in which the married woman was domiciled. In short, by the law of England, it is the Scotch law which must be applied to this Scotch settlement.

It is, however, strongly urged that a strictly alimentary provision for an adult male is not only unknown to and inconsistent with the provisions of English law, as in general it undoubtedly is, but that it is contrary to public policy, and ought therefore to be wholly disregarded in an English Court. I cannot adopt this argument. There is nothing immoral in such a provision. Indeed, there are many instances in which pensions or retiring allowances are by statute made not transferable, or liable to be attached by any legal process. I may refer to the pension allowed to a retiring clergyman under the Incumbents' Resignation Act, 1871, and to the observations of the Court of Appeal on that statute in *Gathercole* v. *Smith*. (2) Moreover, it has been long settled that at common law, and apart from any statutory enactments prohibiting assignment, certain salaries or pensions are inalienable. For example, the half-pay of an officer. In *Flarty* v. *Odlum* (3) Lord Kenyon said: "I am clearly of opinion that this half-pay could not be legally assigned by the defendant. . . . Emoluments of this

(1) 2 My. & K. 513; 39 R. R. 263. (2) (1881) 17 Ch. D. 1.
(3) (1790) 3 T. R. 681, 682; 1 R. R. 791.

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sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. . . . It might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned." In the following year the same question came up for consideration in *Lidderdale* v. *Duke of Montrose.* (1) This was an action by an officer on half-pay against the Paymasters-General of the Army to recover arrears of his half-pay, and the only question was whether an assignment by way of mortgage, of which the defendants had due notice, justified them in withholding the money from the plaintiff. The Court were clearly of opinion that, "on principles of public policy, as well as on account of the interest of the officers themselves, by law such assignments were void." The mortgagee was not party to this action, but it seems to have been thought that he might obtain equitable relief, and he accordingly filed a bill in the Exchequer: see *Stone* v. *Lidderdale.* (2) It was argued that the assignment was good in equity, as a transfer of any valuable contingency or possibility, if made for good consideration, is affirmed in equity. But Macdonald C.B., in a considered judgment, declined to accept this view, and held that the plaintiff was not entitled to any relief in equity in respect of the mortgage. In short, he declined to affect the conscience of the mortgagor in respect of future instalments of the half-pay.

In my opinion it is impossible to disregard this "alimentary provision" on the ground of public policy. The Scotch Court would declare that the interest given to Sir Gerald cannot be assigned, and would disregard the claims of his specific mortgagees, and it is our duty to follow and adopt the Scotch law: *Anstruther* v. *Adair.* (3)

(1) (1791) 4 T. R. 248, 250; 2 R. R. 375.

(2) (1795) 2 Anstr. 533; 3 R. R. 622.

(3) 2 My. & K. 513; 39 R. R. 263.

But then it was urged that Sir Gerald could bind, and did bind, the income as and when it reaches the hands of the trustees in England, and that, whatever might be the rights of his alimentary creditors, he himself ought not to be allowed to claim from the trustees the income which he has, by a contract binding on his conscience, charged in favour of his mortgagees. I doubt whether this doctrine, which is explained and illustrated by Lord Macnaghten in *Tailby* v. *Official Receiver* (1), has any application to a vested life interest, the assignment of which takes effect, if at all, for reasons wholly independent of conscience. An assignment of a vested equitable interest is complete and operative, though voluntary. It in no way depends upon contract, or upon anything further to be done by the assignor. The doctrine applies only where there is no present property capable of assignment, such as possibilities and expectancies. *Stone* v. *Lidderdale* (2) is an authority against the respondent's contention, and I know of no authority in its favour. I may observe that the defendant Lidderdale was a domiciled Englishman, whose general capacity to contract was undoubted. Moreover, this contention is really only another way of presenting the argument that we ought to disregard the Scotch law. If the life interest is capable of assignment, the Court would grant specific performance of the contract, and would aid the mortgagees by granting an injunction. If, however, as in *Stone* v. *Lidderdale* (2), the interest is non-assignable, I think it follows that no effect can be given to a deed purporting to assign by way of anticipation. The decision of the House of Lords in *Scott* v. *Allnutt* (3), which was relied upon, does not really touch the case.

In my opinion, the order of Joyce J. was wrong, in so far as it declared that the whole of the income during the life of Sir Gerald is payable to his assignees or incumbrancers, according to their respective priorities. If the amount of the income were very large, any excess beyond a reasonable amount would, according to the Scotch law, pass to the assignees or incumbrancers, but I do not understand that it is suggested that

(1) (1888) 13 App. Cas. 523, 543. (2) 2 Anstr. 533; 3 R. R. 622.
(3) 2 Dow & C. 404.

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there is any excess in the present case. I think the declaration should be to the effect that Sir Gerald is entitled to the whole income during his life, free from the claim of any assignees or incumbrancers, but without prejudice to the rights (if any) of his alimentary creditors, or of Miss Fitzgerald, and without prejudice to any prior payment in respect of the policy, which is the subject of another appeal by Miss Fitzgerald.

STIRLING L.J. read the following judgment:—I agree with Cozens-Hardy L.J. that Sir Gerald and Lady Fitzgerald entered into a contract that their rights in the property of Lady Fitzgerald (who at the time of the marriage was domiciled in Scotland) should be regulated by the Scotch law: *Este* v. *Smyth* (1); *Chamberlain* v. *Napier*. (2) That property is now vested in trustees who are domiciled in England; but that circumstance is merely accidental, and cannot, as between the trustees and Sir Gerald Fitzgerald, affect either the duty of the trustees or the rights of Sir Gerald, which must, I conceive, be governed by the law of Scotland; and if a Scotch Court would (as I think the evidence shews it would) hold that trustees domiciled in Scotland ought to pay the alimentary provision, made for Sir Gerald by the contract in Scotch form of September 20, 1862, into his hands from time to time as it becomes payable, regardless of the incumbrances which he has purported to create thereon, then, in my opinion, this Court ought likewise to hold that such is the duty of the trustees in the present case. If Sir Gerald Fitzgerald were a domiciled Scotsman there would be nothing more to be said. But he was at the date of the marriage, and has ever since been, a domiciled Englishman, and he is now resident within the jurisdiction of the English Courts. His capacity to deal with his property is an incident of his status: see *Viditz* v. *O'Hagan* (3); and, therefore, is governed by English law. By that law, as stated by Lord Macnaghten in *Tailby* v. *Official Receiver* (4), "it has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form

(1) 18 Beav. 112.
(2) 15 Ch. D. 614.
(3) [1900] 2 Ch. 87.
(4) 13 App. Cas. 523, 543.

of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." In *In re Coleman* (1) this principle was applied to an assignment of an interest under a will to which the assignor became entitled only by virtue of the exercise from time to time in his favour of a discretion vested in the trustees of the will. In this respect the capacity of Sir Gerald Fitzgerald is entirely different from that of a domiciled Scotsman, who, according to the law of Scotland, is unable to alienate an alimentary provision any more than, according to the law of England, a retired officer can alienate his half-pay, either at law or in equity, or a retired incumbent the pension allowed to him under the Incumbents' Resignation Act, 1871, or a married woman separate estate as to which she is restrained from anticipation. In such cases the person entitled to the property in question is by English law incapacitated from dealing with it. But that law does not in general recognise any restraint as regards the property of a man of full age. I cannot see why the English owner of an alimentary provision, created by foreign law, should be held to be incapable of making a disposition of it when it comes to his hands. The foreign law has full effect given to it when it is allowed to determine what ought to come to the hands of the owner in respect of the alimentary provision; after it reaches his hands he is not under any obligation imposed by the foreign law as to how he should apply it, and, as it seems to me, the English law ought to determine whether that which has come to his hands, and become property at his disposal, is to any and what extent subject to obligations arising out of dealings valid according to that law. In my opinion, therefore, an assignment of an alimentary provision, created under foreign law, by will or voluntary deed inter vivos in favour of a domiciled Englishman,

(1) (1888) 39 Ch. D. 443.

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ought to be held by the Courts of this country to bind funds coming in respect of that provision to his hands within the jurisdiction of those Courts. In the present case the alimentary provision was created by a contract into which Sir Gerald entered for valuable consideration. But I cannot see that this puts Sir Gerald in a better position than if he were a volunteer; for I take it to be clearly settled that the doctrine on which I rely applies to property acquired by contract for value just as much as to property acquired by gift. In my judgment, therefore, an order ought to be made on the lines of that actually made by the Court of Appeal in *In re Coleman*. (1) But, although I have been unable to satisfy myself that the opinion which I have expressed is opposed to any existing authority, I can adduce no decision in support of it, while the weighty and considered opinions of my brethren are adverse. In these circumstances I cannot regret that my own view is not to prevail.

VAUGHAN WILLIAMS L.J. read the following judgment:— In my judgment the ante-nuptial contract entered into by Sir Gerald Fitzgerald and Miss Lockhart, with the concurrence of her mother, Lady Lockhart, ought not to be construed and applied according to English law, which is undoubtedly the law of the matrimonial domicil of the husband and wife, and which law would primâ facie determine all questions arising under that marriage contract, but ought to be construed and applied according to Scotch law. It is the intention of the parties, gathered from the terms and circumstances of the contract, which determines the law which governs it, and in my judgment the Scotch form of this contract, coupled with the fact that Miss Lockhart, at the time of the marriage, was a domiciled Scotswoman, and that the property, the subject of settlement, came from her family, is sufficient to displace the primâ facie presumption that the law of the matrimonial domicil is to govern the contract.

Now the Scotch law is thus stated by the late Lord Advocate (Mr. Graham Murray) in his affidavit: "By the law of Scotland

(1) 39 Ch. D. 443.

it is possible for a person to create a life interest in favour of another person, and, by declaring that life-rent to be alimentary, to exclude, so far as the life interest does not exceed in amount a reasonable provision, the diligence of ordinary creditors and restrain all power of anticipation. When, therefore, as here, a lady by ante-nuptial marriage contract conveys her funds to trustees, it is possible for her to create a life-rent of these funds in favour of her surviving husband, and to exclude his ordinary creditors and to restrain him from anticipation."

The late Lord Advocate further points out that the non-chargeable nature of such an alimentary life-rent would be upheld by the Scottish Courts, if the question were there raised by a creditor against a Scottish trustee, and says that it is for the English Court to determine whether, in a question with the English creditors of an English debtor, it will give effect to the Scotch law.

Assuming, as I do, that Scotch law governs all the rights created by the express or implied force of the words of the contract, it may be that there are rights which operate upon the contractual rights which are governed, not by the law which by the disclosed intention of the parties has come to be the "proper law of the contract," determining all questions of its legal effect and construction, but by the law of the actual domicil at the time when any dealing with the property the subject of the contract is attempted, such as questions of personal capacity in cases of minority, coverture, &c.

I cannot, however, persuade myself that in this case any question of personal capacity is raised. The case is simply this, that previous to the marriage a contract in the Scotch form, governed as to its legal construction and effect by the law of Scotland, was executed, whereby Miss Lockhart's property was settled upon trust (amongst other things), in case the husband should survive, that the proceeds of the estate should be paid to him for his life, but that all payments to him should be "strictly alimentary," and should "not be assignable nor liable to arrestment, or any other legal diligence at the instance of his creditors." These words of the contract limit the interest which the husband is to take, in the same way as

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in an English marriage contract the wife's interest is made subject to a restraint on anticipation.

The restriction on chargeability in either case arises out of the terms of the contract and the trust thereunder. There is no personal incapacity; neither the wife, in the case which I have put, nor the husband in the present case, can claim more under the trust than is given to her or him by the trust. It seems to me that no equity acting on the conscience of Sir Gerald Fitzgerald can enable him, in respect of the life income given to him by the trust created by the contract, to do with that income that which it is impossible for him to do according to the effect of the Scotch contract, when construed by Scotch law.

Indeed, in the matter of the comparison of equities, I think that no obligations can bind the conscience of a person taking a life estate bestowed on him by another more strongly than the trust contract containing the conditions under which the donor has bestowed the gift, and this whether the conditions are expressed or are imposed by the law governing the contract. *Anstruther* v. *Adair* (1) is really an authority for the proposition that an English Court of Equity, in construing a Scotch contract or enforcing a trust thereunder, will not enforce a wife's equity to a settlement against a husband who comes to the Court to enforce against the surviving trustee resident in London his right to have a fund transferred to him absolutely, as the survivor of his wife, by virtue of a clause in the marriage contract. This seems to me in principle to decide that a Court of Equity in England will not, in contravention of plain provisions in a foreign contract, enforce equities binding the conscience of a beneficiary claiming under that contract.

If I am right in holding that in this case no question of personal capacity is raised, and if I am also right in what I have just said as to a Court of Equity not enforcing equities which, though binding the conscience of such a beneficiary, are inconsistent with the instrument under which he claims when construed by its proper law, i.e., the foreign law, the only remaining question is whether the provision in this Scotch

(1) 2 My. & K. 513; 39 R. R. 263.

marriage contract, "that all payments to Sir Gerald Fitzgerald shall be strictly alimentary and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors," so conflicts with what are deemed in England to be essential public interests, that the provision cannot be enforced here. This, as I understand, is the ground on which Joyce J. refused to give effect to the provision. He relied upon the law as stated in Westlake on Private International Law, 3rd ed. s. 215, that, "where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law."

The law thus stated seems to me to be accurate, and to correspond, as pointed out by Westlake, p. 40, with art. 6 of the Code Napoléon: "Private contracts cannot derogate from laws which interest public order or good morals." The question in each case is, whether the foreign law or the private agreement conflicts with a law in which the public order and good morals concerned are essential enough to call into operation the reservation in favour of stringent domestic policy, which in principle is recognised and insisted upon by all civilised nations.

The English law, in so far as it refuses to give effect to provisions which affect to control the rights of disposition which are attached to an absolute transfer of property, does not seem to me to be a matter regarding "public order or good morals."

It is, I think, merely a logical development from legal definitions adopted by the English law. But it is true that in its application this law has been made the means of protecting creditors, and yet I do not think that in a country which allows restriction on anticipation in respect of the separate property of a wife, it can possibly be said that to enforce a provision in a Scotch contract inconsistent with this law would be contrary to public order and good morals, even though the result might be to defeat the just rights of a creditor.

There are other instances to which my attention has been called by the judgments of my learned brethren, which I have

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been allowed to read, in which sometimes the Legislature and sometimes the Courts of Common Law have recognised restrictions as inconsistent as those in this Scotch contract with the alleged essential rule of public order and good morals.

I agree with the judgment delivered by Cozens-Hardy L.J.

I cannot agree with the conclusion of Joyce J.

THE COURT granted a stay of execution, pending an appeal to the House of Lords, on terms.

Solicitors: *G. J. Fowler; Surman & Quekett; Redfern & Hunt; White, Borrett & Co.; Trower, Still & Co.; Keen, Rogers & Co.*

W. L. C.

C. A. 1904 *Feb.* 12.

In re SUSSEX BRICK COMPANY.

[00124 of 1903.]

Company — Register of Members — Transfer of Shares — Non-registration — "Default or Unnecessary Delay" in Registration — Accidental Mistake — Reconstruction of Company — Voluntary Liquidation — Unregistered Shareholder — Dissent from Resolutions, Notice of — Rectification of Register — Registration nunc pro tunc, Order for — Retrospective Registration — Rights of Third Parties, Protection of — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 98, 131, 161.

The power given to the Court by s. 35 of the Companies Act, 1862, of rectifying the register of members of a limited company is exercisable in any of the cases therein mentioned, whether a company is in liquidation or not; and, accordingly, in a liquidation the power is not, by s. 98, limited to rectification for the purpose of settling the list of contributories.

In ordering rectification of the register under s. 35, whether the company is in liquidation or not, the Court has power, in a proper case, to fix a particular date at which the registration shall become operative, even to the extent of making it retrospective; but subject, if necessary, to conditions protecting the rights of third persons.

The transferee of shares in a limited company sent in his transfer to the company for registration in the usual course, but by mistake or oversight registration of the transfer was omitted. Subsequently the company passed resolutions for a voluntary winding-up with a view to reconstruction, whereupon the transferee, in the belief that his transfer had been registered, and purporting to act under s. 161 of the Companies Act, 1862, served the liquidator with notice of dissent, which, however,

the liquidator disregarded on the ground that the transferee was not a "member" of the company as required by the section. Upon an application by the transferee, under s. 35, for rectification of the register so as to render his notice of dissent effectual:—

Held, by the Court of Appeal (varying an order of Buckley J.), that there had been such "default or unnecessary delay" in registration as entitled the applicant to an order for rectification by entering his name on the register as on a day prior to the passing of the winding-up resolutions:

Held, also, that the order did not invalidate the notices to registered members by which the meetings for a voluntary liquidation had been called, and would not, in the circumstances, work any injustice to other members of the company.

Nation's Case, (1866) L. R. 3 Eq. 77, *Breckenridge's Case*, (1865) 2 H. & M. 642, and *Reese River Silver Mining Co.* v. *Smith*, (1869) L. R. 4 H. L. 64, 80, applied.

ON January 16, 1901, William Belcher, the chairman and managing director of the Sussex Brick Company, Limited, executed a transfer to George Bowman Browne and David G. H. Pollock of 5000 fully paid 1*l.* shares in the company; and on March 3, 1903, he executed a transfer to them of 17,234 further fully paid 1*l.* shares in the company. At the respective dates of the transfers Belcher was the duly registered holder of the shares. The company's articles of association contained a clause that "The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register-book in respect thereof." Accordingly both transfers were executed by the transferees as well as by the transferor.

On March 12, 1903, Browne wrote to the company's secretary inclosing the transfer of the 17,234 shares and the certificate for those shares, with a request for a new certificate. On March 14 the secretary replied inclosing a receipt for that transfer, and stating that the transfer would be laid before the board, and that the new certificate would be ready about March 28.

Between March 14 and 21 the secretary resigned, and at a board meeting on the 21st the directors appointed a new

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secretary. The transfer of the 17,234 shares was not submitted to the board at that meeting, the only resolution then passed being that appointing the new secretary. It was not until after the date of that meeting that the new secretary became aware of Browne's letter of March 12 and of the late secretary's reply of the 14th.

On March 23 the transfer books were closed.

On March 27 Browne wrote to the company's secretary inclosing the transfer and certificate of the 5000 shares, and also asking for a certificate of the 17,234 shares; and on April 1 the secretary replied acknowledging the receipt of the transfer and certificate, adding, "As you are aware, the books have been closed until after the meeting to-morrow."

On April 2 an extraordinary general meeting of the company was held at which special resolutions were passed for a voluntary winding-up and for the appointment of a liquidator, with a view to the reconstruction of the company with an increase of the capital.

On April 4 Browne again wrote to the secretary: "As we presume that the books of the company are now open, we shall be glad to receive a reply to our letter of the 27th ult." On the same day the secretary replied that he would place the transfer of the 5000 shares before the directors at the next board meeting, when a certificate would be made out, signed, and forwarded. On the same day Browne wrote a further letter to the secretary acknowledging the receipt of his last letter, and reminding him that he had said nothing about the 17,234 shares, a certificate for which was to have been ready about the 28th ult. In reply to that letter the secretary wrote on April 6: "Your transfer for 17,234 shares will be placed before the directors, together with the transfer for 5000 shares, at their next board for registration, and when registered I will forward the certificates to you. Formal receipt for the 5000 shares herewith inclosed." The receipt inclosed stated that the certificate would be ready on April 27, 1903.

No subsequent board meeting of the directors was held, and at an extraordinary general meeting of the company on

April 20 the resolutions passed at the general meeting of April 2 were confirmed.

On April 25, 1903, Messrs. Browne and Pollock, being apparently under the impression that their transfers had been registered, served the liquidator with a notice, under s. 161 of the Companies Act, 1862, stating that they dissented from the resolutions, and requiring him either to abstain from carrying them into effect or to purchase their interest in the company at a price to be determined according to s. 162.

In reply the liquidator reminded Messrs. Browne and Pollock that their transfers had not been registered, so that their notice was invalid.

To enable them to rely upon their notice of dissent Messrs. Browne and Pollock, together with Belcher, took out a summons under s. 35 of the Companies Act, 1862, against the liquidator for a declaration that the two transfers which had been deposited with the company for registration prior to March 20 and April 4, 1903, respectively ought to have stood registered on those dates, and for an order on the liquidator to rectify the register of members accordingly as and from those dates respectively by substituting the names of the transferees for that of the transferor.

The summons was heard by Buckley J., who, on July 30, 1903, made an order for the rectification of the register by simply registering the transfers, but refusing any direction for registration nunc pro tunc.

Messrs. Browne, Pollock, and Belcher appealed from that order by asking that it might be varied by providing that the rectification of the register thereby ordered should have effect as regarded the 17,234 shares, as at and from March 20, 1903, and, as regarded the 5000 shares, as at and from April 4, 1903.

There was also a cross-appeal by the liquidator against any rectification of the register whatever.

The appeals were heard on February 12, 1904.

Muir Mackenzie, for Messrs. Browne, Pollock, and Belcher. Sect. 161 of the Companies Act, 1862 (25 & 26 Vict. c. 89), enacts that where any company is proposed to be or is in

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course of being wound up altogether voluntarily, and the whole of its business is proposed to be transferred or sold to another company, the liquidators of the first company may, with the sanction of a special resolution, carry out the sale or arrangement, subject to this proviso, that if "any member of the company being wound up" expresses his dissent from the resolution in writing, "such dissentient member" may require the liquidator either to abstain from carrying the resolution into effect or to purchase the interest held by such dissentient member. And then s. 162 says that in case of purchase the price shall be fixed either by agreement or by arbitration. So that only a "member"—that is a registered member—of the company can give an effective notice under s. 161. This rendered the present application necessary. The order of Buckley J. is insufficient, as it simply directs the rectification of the register by inserting the names of the two first appellants, but without reference to any date. I submit that those appellants should be treated as if they had been members of the company in respect of these shares before the passing of the winding-up resolutions, and I ask that the order may be varied by declaring that the transfers shall date as from March 20 and April 4, 1903, respectively. Sect. 35 of the Act, under which the application for rectification is made, provides that "If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may" apply to the Court for the rectification of the register. Under that section rectification was ordered in a case, as here, of "unnecessary delay": *Nation's Case* (1), a case which, we submit, covers the present.

Gore-Browne, K.C., and *J. E. Harman*, for the liquidator. This case raises for the first time the question whether, after a company has gone into liquidation, a shareholder can have

(1) L. R. 3 Eq. 77.

the date of his registration as a member dated back except for the purpose of settling the list of contributories.

The rule seems to be that, before liquidation, the Court will rectify under s. 35, but that, after liquidation, it will rectify under another section, s. 98, which is as follows: "As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities."

[COZENS-HARDY L.J. But the words "where such rectification is required in pursuance of this Act" in that section appear to refer back to s. 35. If so, s. 35 is incorporated in s. 98.]

That appears to be so; but s. 98, which is in the part of the Act relating to liquidation, keeps s. 35 in operation only for the purpose of settling the list of contributories. And that is the distinction between the present case and *Nation's Case* (1), which dealt with the settlement of the list of contributories.

[COZENS-HARDY L.J. But s. 131 allows of certain transfers of shares even after a winding-up. That is something quite different from settling the list of contributories.]

After liquidation, a man's rights are determined by the question, not whether he is a "member," but whether he is a "contributory"; therefore, except as a preliminary step to forming a list of contributories, it does not matter whether or not a man is on the register.

[VAUGHAN WILLIAMS L.J. Will you look at Buckley J.'s note on p. 322 of his book on Companies, 8th ed., commencing "After a winding-up"?]

The note is upon s. 98, and the passage at the top of p. 323 seems to support our view, that after the order has been made and before the list of contributories has been settled you may move for rectification under s. 98 and s. 35—that is, after a winding-up, s. 35 has no operation apart from s. 98.

In the present case, if the argument of the appellants Browne

(1) L. R. 3 Eq. 77.

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and Pollock is right, and they were in truth members of the company before the meetings in question, it follows that they ought to have had notice of the meetings, and it may be that as they had no notice the meetings were badly held, the resolutions passed are void, and there is no liquidation at all.

[VAUGHAN WILLIAMS L.J. It is not suggested that, in remedying the injury done to these appellants by the unnecessary delay in the registration of their transfers, injury should be done to other people, such as by holding the meetings to be bad. The only question is whether these shareholders who expressed their dissent from the resolutions are, for the purposes of that dissent, to be treated as having had their names on the register before the meetings, or at all events before the confirmatory meeting. I cannot conceive why they should not. That would not affect the validity of the meetings or the validity of any proceedings under them in the slightest degree. In *Nation's Case* (1) no one suggested that the order there made would have the effect of making any resolution or any subsequent proceedings bad.]

There it was not necessary to raise that question at all; the only question was whether the Court should give effect to a contract between two persons that one of them should cease to be a member of the company on a particular day so as not to be treated as being a contributory in the winding-up. In the present case it would seriously affect the rights of other members if the appellants who hold this very large number of shares could now come in and by their notice of dissent compel arbitration and a valuation of their shares. This might ruin the whole scheme of reconstruction. We submit, therefore, that this is a case in which, apart from the mere question of notice of dissent, the rights of other persons are seriously affected. Sect. 35 no doubt gives the Court power to order a rectification of the register by taking one name off and putting another on; but we submit it has no power, except for the purpose of settling the list of contributories under s. 98, as in *Nation's Case* (1), to make the addendum that the registration of the new name shall be dated back.

(1) L. R. 3 Eq. 77.

VAUGHAN WILLIAMS L.J. I think that this appeal must be allowed. I propose to deal with this case as one in which there has been an unfortunate accident arising from very unnecessary delay in putting the names of these gentlemen, Messrs. Browne and Pollock, upon the register. The section of the Act of 1862 one has first to consider is s. 35, which is as follows: [His Lordship read the section, and proceeded:—]

Now, in this case there can be no doubt but that the names of these gentlemen ought to have been on the register at a date earlier than the time of the holding of the meetings in relation to the reconstruction of this company. Under those circumstances, when one looks at *Nation's Case* (1), which was a decision by Lord Romilly M.R., there can be no doubt that that is an authority for the proposition that when it is right that an order for rectification should be made—whether the order be for rectification by taking a name off the register or by putting a name on—the Court may make an order, not only that the right name shall be put on or taken off, as the case may be, but that the register shall be treated as if the name had been on or off at the time it ought in fact to have been on or off.

But what is said here is this: "It is quite true that that may ordinarily be done in the exercise of the powers given by s. 35 of the Act; but the power which was actually exercised by Lord Romilly in that case was a power exercised under s. 98 for the purpose of settling the list of contributories in a winding-up; and inasmuch as in the present case a liquidation has commenced, the only power under which the register can now be rectified is that conferred by s. 98, and the Court can no longer act under the general powers of s. 35." Sect. 98 says: "As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities."

It is said that after the liquidation rectification is really not

(1) L. R. 3 Eq. 77.

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under s. 35, but under s. 98, and that under these circumstances the rectification here ought not to be made nunc pro tunc. Upon that point I may refer to *Breckenridge's Case* (1), which was a decision of Wood V.-C. On looking at that case one finds that this particular point was raised there. Mr. Morris in argument says: "The 98th section of the Act is a positive direction as to the course which is to be pursued. The Court is to settle a list of contributories, with power to rectify the register for that purpose, and is bound to rectify the register, so far as may be necessary." When the learned Vice-Chancellor came to give judgment, he says this (2): "It is said in opposition to the motion, that it is irregular after a winding-up order has been made, because the whole matter is then in the hands of the Court, and I am referred to the 98th section of the Act to shew that the rectification of the register is, after such an order, a matter merely auxiliary to the settlement of the list of contributories. But there is nothing in that section to prohibit the Court from acting in respect of the share register of the company, in any manner in which it might have acted had that section not existed, and I cannot therefore hold that the hands of the Court are in any manner tied by that section." That decision of Wood V.-C. seems to me to be exactly in point, and to negative the argument which Mr. Gore-Browne has addressed to us. And, indeed, I see that that view is taken by Buckley J. in his work on Companies, 8th ed. pp. 322–3, in his note to s. 98, where he cites several authorities, including *Breckenridge's Case* (1), which I have no doubt bear out his proposition. His note is this: "After a winding-up order has been made, the power of rectification given to the Court by s. 35 is not cut down and reduced to a mere power of rectification in the settlement of the list of contributories. It is open to a contributory, after the order has been made, and before the list of contributories has been settled, to move for rectification under this section and the 35th section."

I have only to add this, that I do not mean for a moment to suggest that any one is entitled to such an order ex debito

(1) 2 H. & M. 642. (2) 2 H. & M. 645.

justitiæ; it is a matter in the discretion of the judge, and there might be cases in which the judge, although he considered such an order essential to completely establishing the rights of the applicant, might refuse to do so because he thought it would work injustice to other members of the company. If I thought here that such an order would work injustice to other persons, especially to persons who are not in any way bound by the mistake of the company, I should feel considerable hesitation in making the order; but in the present case there is no evidence before us that any injustice will be caused at all. It has been suggested that if we make the order asked for we shall invalidate the resolutions, because the meetings will not have been properly called; and other suggestions of a similar kind were made in the course of the argument. As the matter stands, we can do justice and prevent any wrong accruing to these two gentlemen, Messrs. Browne and Pollock, without doing any injustice to any one else.

Under these circumstances I think that the order for rectification ought to be made as asked.

STIRLING L.J. I am of the same opinion. The first objection that has been raised in this case to the exercise of the jurisdiction conferred on the Court by s. 35 of the Companies Act, 1862, is that after a winding-up has commenced the Court is deprived of the power of exercising that jurisdiction except for the purpose of settling the list of contributories. That objection is based on the language of s. 98, which provides that "as soon as may be after making an order for winding-up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act." It is said that by reason of this enactment the power of rectification which is derived under s. 35 is limited to the settlement of the list of contributories. Now, I think that is entirely contrary to previous decisions. Not only is it contrary to the case to which my Lord has referred, namely, *Breckenridge's Case* (1), but I observe that in another case

(1) 2 H. & M. 642.

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which is cited in Buckley J.'s book, the *Reese River Silver Mining Co.* v. *Smith* (1), there is the high authority of Lord Cairns for the proposition which was laid down by Sir William Page Wood in the case which has already been cited. Lord Cairns says: "Notwithstanding the winding-up, the Court, under the 98th section, is to rectify the register of members in all cases where such rectification is required in pursuance of the Act, that is to say, at all events in those cases pointed out by the 35th section."

Now, the present case falls within the 35th section, because as the learned judge has found—and the finding of fact is really not disputed—there has been, in the language of the Act, "unnecessary delay in entering on the register the fact of any person having ceased to be a member of the company"; and he has also found that the names of the applicants, Messrs. Browne and Pollock, have been "without sufficient cause omitted from the register of members." That being so, the jurisdiction to make such an order as Buckley J. has made exists, and the order, therefore, must be sustained as far as it goes.

But then it is said the appeal seeks to have the date fixed as from which the change on the register is to be operative, and it is contended that the Court, under s. 35, has no power to do that. There again it seems to me that we have the guidance of authority so old as the decision of Lord Romilly in *Nation's Case* (2), which was given in the year 1866. The order there was made by the Master of the Rolls—though no doubt with regard to s. 98—in the exercise of the powers conferred by s. 35. It is, therefore, an authority that in a proper case the Court has power to fix a date as from which the change in the register is to be made operative. But then after that there arises a point which requires serious consideration. The application of the appellants here is, in substance, that the registration be made nunc pro tunc. Now, when an order of that sort is made the Court ought to be very careful to see that it does no injustice by making the registration retrospective. I may point out that the power which is conferred by s. 35 is not imperative. All it says is that the Court "may" in a proper

(1) L. R. 4 H. L. 64, 80. (2) L. R. 3 Eq. 77.

case make an order for rectification. Therefore the Court has full discretion to deal with every particular case which comes before it in such a way as may do complete justice; but in the present case I fail to see that any injustice can be done if the alteration is made as asked. What took place was this: These gentlemen, Messrs. Browne and Pollock, pressing to have their transfers registered and seeking to have their certificates as soon as possible, get answers from the secretary of the company which led them to believe that at all events, by the date of the last meeting of the company, the register would be altered and they would appear as members. They, supposing this had been done, although they had not received their certificates, sent in a notice of dissent from the special resolution in the way prescribed by s. 161 of the Act. That gave the liquidator full notice of the position that they took in the matter, and he chose to disregard it. Then this application is made to Buckley J. with the result that the register is altered in favour of the applicants. There is no evidence before us which leads me to suppose that any injustice is likely to accrue from the alteration in the register being dated so as to cover the notice which was given by the appellants, Messrs. Browne and Pollock, in the exercise of the rights which they would have had under s. 161 if they had been registered as members.

I think, therefore, that the order ought to be made.

COZENS-HARDY L.J. I am entirely of the same opinion. It seems to me that Mr. Gore-Browne's argument is really based on this hypothesis, that the register of members is a thing which ceases to have any real operation or existence after the winding-up order; that the only right which can be dealt with after a winding-up order is one with regard to making some change in the position of persons on the list of contributories. Now on looking at the scheme and method of the Act, it is clear that the list or register of members is one thing, and the list of contributories is an entirely different thing. The list of contributories—to mention one distinction, what is known as list "A" and list "B"—is something larger than and different

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from the register of members; and the Act itself, as it seems to me, indicates in no doubtful manner that, notwithstanding a winding-up, the register of members and the status of members may be altered.

Now s. 131, the very section under which Buckley J. has acted or partly acted in this case, says this: "Whenever a company is wound up voluntarily the company shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencement of such winding-up shall be void." That section provides that there may be, after a winding-up, transfers of shares with the sanction of the liquidators. That being so, it seems to me that, quite apart from any list of contributories, there is a register of members which, under the provisions of s. 35 of the Act, may be rectified. *Breckenridge's Case* (1) and *Reese River Silver Mining Co.* v. *Smith* (2), to which my brethren have already called attention, seem to me conclusively to shew that the power given by s. 35 is independent of that which is given by reference under s. 98. I, therefore, cannot doubt that the Court now has the right to exercise every power which is conferred by s. 35 in any case in which it finds there has been an undue delay in registering a transfer. That there has been undue delay here is found as a fact by the learned judge, and the accuracy of that finding is really not disputed.

Then we have authority going back to the very early days of the Companies Act, 1862, that an order under s. 35 for rectification of the register "may"—not "must"—be made having a retrospective effect, that is, may be made in a proper case and imposing such conditions as the Court thinks necessary to protect the rights of any third persons; but in a case like the present, where there has been no serious suggestion of any ill result or any unjust consequence which would follow from dating the registration of the transfers as on the dates on

(1) 2 H. & M. 642. (2) L. R. 4 H. L. 64.

which they ought to have been registered, I can see no ground for imposing any condition whatever.

I think, therefore, the order asked for is quite right.

Muir Mackenzie. The notice of appeal asks that the one transfer should be dated back to March 20, and the other to April 4; but it will be sufficient if both are made to date April 4.

VAUGHAN WILLIAMS L.J. Very well; let that be so. The appellants will have the costs of the appeal.

Harman. I understand that the order will not invalidate the notices of the confirmatory meeting of April 20.

VAUGHAN WILLIAMS L.J. It will not affect the notices at all. The notices were in accordance with the register as it then stood.

[The liquidator's cross-appeal was dismissed with costs.]

Solicitors: *Ingle, Holmes, Sons & Pott; Morris Fuller & Co.*

G. I. F. C.

Applied. AMERICAN FLANGE, ETC., CO. INC. *v.* VAN LEER. [1948] 2 All E.R. 698.

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DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* DAVID MOSELEY & SONS, LIMITED.

[1903 D. 426.]

Patent—Infringement—Patent for Combination—Sale of Component Part—Intention of Purchaser to infringe—Knowledge of Vendor.

The sale of a component part of a combination, the subject of a patent, the vendor knowing that the purchaser intends to use the article for the purpose of infringing the patent, is not an infringement by the vendor.

Townsend v. *Haworth*, (1875) 12 Ch. D. 831, n.; 48 L. J. (Ch.) 770, n., followed.

Decision of Swinfen Eady J., ante, p. 164, affirmed.

APPEAL from the decision of Swinfen Eady J. (1), where the facts are fully stated.

The action was brought to restrain the infringement by the defendants, David Moseley & Sons, Limited, and the India Rubber and Tyre Repairing Company, of two patents belonging to the plaintiffs, and known as the Welch patent and the Bartlett patent. The Welch patent was for "improvements in rubber tyres and metal rims or felloes of wheels for cycles and other light vehicles." The Bartlett patent was for "improvements in tyres or rims for cycles and other vehicles." Each patent was for a combination.

It was alleged against the defendants Moseley that they had manufactured outer detachable covers which were adapted for use in the manner described in the specifications of the patents respectively, and had sold the same to persons who, to the knowledge of the defendants, intended to use the covers for the purpose of infringing the patents.

The learned judge held that this did not amount to an infringement by the defendants Moseley. He also held on the evidence that there had been no infringement by the other defendants.

The plaintiffs appealed.

(1) Ante, p. 164.

T. Terrell, K.C., C. A. Russell, K.C., J. C. Graham, and *A. J. Walter,* for the plaintiffs. The defendants Moseley & Sons make and sell their covers to unlicensed persons, knowing that substantially they can only be used for infringing the patents, and intending them to be so used. They are, therefore, joint tortfeasors with the ultimate infringers and liable for the infringement. An infringement of a patent is a trespass. That is a tort, and the defendants are liable for the completed tort, if they have combined with others to commit it. If different persons combine to sell different parts of the patented combination, it is submitted that each of them is liable; although, according to the judgment from which we appeal, the only person liable would be the man who put the parts together. The question is, whether the defendants intended to take part in the tort.

[VAUGHAN WILLIAMS L.J. You must treat it as a criminal offence, and prove the actual commission of the tort. Here you have not proved any infringement. The defendants did not sell all the parts of your combination.]

The plaintiffs are not bound to sue all the tortfeasors. It is impossible to find the members of the public who put the parts together. The Court will infer that there has been an infringement from the defendants' course of business. They describe their covers as ready for the wires. Wires cannot be inserted in these covers without infringement, and a patent may be infringed by repairing the patented article: *Dunlop Pneumatic Tyre Co.* v. *Neal.* (1) A sale of all the parts of a patented combination is an infringement: *United Telephone Co.* v. *Dale.* (2)

An intention to take part in a tort, as distinguished from an intention to infringe, is material. That is shewn by the cases on contribution between tortfeasors, which is not allowed except in favour of an innocent participator in the tort: *Merryweather* v. *Nixan* (3); *Adamson* v. *Jarvis* (4); *Betts* v. *Gibbins.* (5) The plaintiffs do not say that the defendants

(1) [1899] 1 Ch. 807.
(2) (1884) 25 Ch. D. 778.
(3) (1799) 8 T. R. 186; 16 R. R. 810.
(4) (1827) 4 Bing. 66; 29 R. R. 503.
(5) (1834) 2 Ad. & E. 57; 41 R. R. 381.

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themselves infringed the patent, but that they intentionally took part in an act which they knew was illegal. "In the case of a joint trespass, the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass": *Clark* v. *Newsam*. (1)

It is not necessary to shew that the defendants sold all the parts at the same time. By the form of a patent all persons are prohibited from either directly or indirectly making use of or putting in practice the invention or any part of the same.

[VAUGHAN WILLIAMS L.J. Selling part of a combination is not an infringement of a patent for the whole combination.]

There must be some limit to the irresponsibility of a person who knows that a wrongful user is going to be made of an article which he sells. The vendor must be liable for the sale of an article for the very purpose of its being improperly used. The learned judge never considered the question whether a tort had been committed to which the defendants were parties. In *Sykes* v. *Howarth* (2) the defendant had infringed the patent through his agent, and was held liable for the act of the agent. That applies here, and *Townsend* v. *Haworth* (3) is distinguishable. Here the defendants sold the covers for the purpose of their being used as part of the plaintiffs' combination. The proper inference is that the defendants were knowingly taking part in an infringement of the plaintiffs' patent. In *Adams* v. *Kelly* (4), an action for libel, the defendant had orally communicated to a reporter for a newspaper a libellous statement, and the reporter put the statement in writing and gave it to the editor of the newspaper for publication, and it was published in the paper, and it was held that the libel must be considered as published by the defendant.

[VAUGHAN WILLIAMS L.J. In that case the jury on the evidence came to the conclusion that the defendant told the reporter to publish the statement in his newspaper. The defendant was a principal in the publication.]

So here, if a man makes and sells an article which can be of

(1) (1847) 1 Ex. 131, 140.
(2) (1879) 12 Ch. D. 826.
(3) 12 Ch. D. 831, n.; 48 L. J. (Ch.) 770, n.
(4) (1824) Ry. & Moo. 157; 27 R. R. 739.

no use except for one purpose, i.e., except as a component part of a particular combination, the subject of a patent, the proper inference is that he has made himself a party to the infringement of the patent. *Townsend* v. *Haworth* (1) does not conflict with this view. A patent protects "the invention and every part thereof." Making a part of a combination may be an infringement: *United Telephone Co.* v. *Dale* (2); *Lister* v. *Leather* (3); *Parkes* v. *Stevens.* (4)

[VAUGHAN WILLIAMS L.J. referred to *Harrison* v. *Anderston Foundry Co.* (5)]

Cripps, K.C., Eve, K.C., and *O. L. Clare*, for the defendants Moseley & Sons; and

Hon. E. C. Macnaghten, K.C., and *Mark Romer*, for the India Rubber and Tyre Repairing Company, were not called upon.

VAUGHAN WILLIAMS L.J. This case has been argued at considerable length, but in my judgment it is really covered by authority, and the decision of Swinfen Eady J. ought to be affirmed. Having regard to the whole course of the action, both before Swinfen Eady J. and upon the hearing of the appeal, there can be no doubt that the real question which the plaintiffs intended to raise was this: Whether the selling of an article intended to the knowledge of the vendor to be used by the purchaser for the purpose of infringing a patent is an infringement of the patent. In my judgment it is not.

I will take the short statement of the facts given in the judgment of Swinfen Eady J. He said (6): "There is practically no dispute as to the facts with regard to the defendants Moseley. They are making and selling an outer detachable cover, with a lining suitable for the insertion of wires, so that the cover, as sold by them, is adapted for use in the manner described in Welch's specification, but not necessarily for use solely in that manner. They are also making and selling a

(1) 12 Ch. D. 831, n.; 48 L. J. (Ch.) 770, n.
(2) 25 Ch. D. 778, 782.
(3) (1858) 8 E. & B. 1004.
(4) (1869) L. R. 8 Eq. 358, 366, 367.
(5) (1876) 1 App. Cas. 574, 590.
(6) Ante, p. 168.

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cover with beaded edges, but without pockets for wires, which cover is capable of being used in the manner described in Bartlett's specification, the beads or lugs of the cover engaging in the inturned angle of the rim." In my judgment our conclusion ought to be the same whether Swinfen Eady J. was or was not in fact right in saying that these covers, though they are adapted for use in the manner described in the specifications, are not necessarily for use solely in that manner. The learned judge said (1): "Although probably in most cases the covers would ultimately form part of either a Welch or Bartlett combination, I am of opinion that those combinations do not exhaust the purposes to which the covers may be put, and that they would be useful for other purposes in connection with other tyres, as one of the expert witnesses pointed out."

Now it is plain that what the plaintiffs allege is that there has been an infringement by the defendants, and that the infringement consists in the sale of these covers, which are constituent parts of one or other of the methods the subject of the combination patents, known as the Welch patent and the Bartlett patent. In my opinion the sale of these covers does not amount to nor is evidence of an infringement of either of those patents. In truth and in fact, veil it as you like, the plaintiffs do not complain of any infringement in which the defendants have taken part as actors. All that they complain of is the sale of these covers to persons who the defendants must have known intended to commit an infringement of one or other of the patents.

In my judgment the authorities which have been cited shew conclusively that in this state of facts there would be no infringement by the defendants of these patents. Our attention has been called to the judgment of Jessel M.R. in *Townsend* v. *Haworth* (2), reported in a note to *Sykes* v. *Howarth*. (3) Jessel M.R. said (4): "You cannot make out the proposition that any person selling any article, either organic or inorganic, either produced by nature or produced by art, which could in

(1) Ante, p. 171.
(2) 12 Ch. D. 831, n.; 48 L. J. (Ch.) 770, n.
(3) 12 Ch. D. 826; 48 L. J. (Ch.) 769.
(4) 12 Ch. D. 831, n.

any way be used in the making of a patented article can be sued as an infringer, because he knows that the purchaser intends to make use of it for that purpose." That case went to the Court of Appeal, and the judgment of Jessel M.R. was affirmed. I wish to direct attention to an observation at the end of the judgment of Fry J. in *Sykes* v. *Howarth*. (1) He said: "In what I have said I think there is nothing at variance with the conclusion expressed by the Court of Appeal and by the Master of the Rolls in *Townsend* v. *Haworth* (2); and I entirely agree, if I may say so, that selling articles to persons to be used for the purpose of infringing a patent is not an infringement of the patent." And he pointed out that *Sykes* v. *Howarth* (1) was an entirely different case.

The facts which had to be dealt with in *Sykes* v. *Howarth* (3) are thus stated in the head-note, which is very concise and very accurate: "Improvements in 'card' covered rollers were the subject of a patent. A., under a contract to 'clothe' rollers for B., made cards, and in accordance with the patent the cards were 'nailed' to the rollers by a person selected by B. and paid by A.:—*Held*, that the 'nailer' was the agent of A., and that A. had infringed the patent." The ground, therefore, of that decision was that the "nailer" was the agent of A., and was paid by him, and it was on that ground that, as Fry J. points out, the case differed entirely from that of *Townsend* v. *Haworth*. (2)

I will now read what was said by the Lords Justices on the hearing of the appeal in *Townsend* v. *Haworth*. (4) James L.J. said, "It is clear there is no case for an injunction. Upon this bill there is no allegation that the demurring defendants are in any sense of the word infringers. It is true that they may be having a privity in the sale of the articles, and may indemnify the other defendant, the infringer. But it is impossible to my mind to conceive a declaration at law which would meet the case and make them liable, and if they are not liable at law they are not liable in equity." That is, James L.J. not only decided the question upon the demurrer,

(1) 12 Ch. D. 826, 833; 48 L. J. (Ch.) 769.
(2) 12 Ch. D. 831, n.; 48 L. J. (Ch.) 770, n.
(3) 48 L. J. (Ch.) 769.
(4) 48 L. J. (Ch.) 773, n.

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but he took the facts stated in the bill, and said that to his mind it would be impossible on those facts to conceive any declaration at law which would meet the case. Then Mellish L.J. said: "I am of the same opinion. I think it is quite clear that at law the defendant would be entitled to a verdict on a plea of not guilty. Selling materials for the purpose of infringing a patent to the man who is going to infringe it, even although the party who sells it knows that he is going to infringe it and indemnifies him, does not by itself make the person who so sells an infringer. He must be a party with the man who so infringes, and actually infringe." Now in form, what the plaintiffs are complaining of here is an infringement of the patents; but, when they come to the evidence of infringement, they do not prove that the defendants are parties with any one who has infringed, and they do not prove that the defendants have actually infringed. Of course, if the defendants were parties to an infringement, in such a sense that they would be principals, if infringement were indictable as a criminal offence, they would be equally responsible in a civil action. But how can it be contended for a moment that, if infringement were an indictable offence, there would upon these facts be any case to go to a jury against the defendants? The truth is that not only are the defendants not parties with a person who has committed an infringement so as to make them what is called in criminal law "principals in the first degree," but it is equally clear that they are not even what is called in criminal law "principals in the second degree." It cannot be said on these facts that they have aided or abetted any one in the commission of an act of infringement. The truth is that, taking the evidence and the findings of the learned judge, of which I can see no reason to disapprove, it is impossible to say that there is any infringement either alleged or proved. It seems to me impossible to say that the plaintiffs have shewn a good cause of action because they have proved the sale by the defendants of articles which are adapted for use in one or other of the combinations patented by the plaintiffs. In my judgment the plaintiffs' case would fail even if they could substantiate the proposition

which the learned judge found against them, that these covers as manufactured and sold by the defendants could not be used for any other purpose than fitting them into the plaintiffs' tyres under one or other of the patents.

I wish to say a word about *United Telephone Co.* v. *Dale.* (1) In that case in the course of the argument Pearson J. said (2): "If there was a patent for a knife of a particular construction, and an injunction was granted restraining a defendant from selling knives made according to the patent, and he was to sell the component parts so that any school-boy could put them together and construct the knife, surely that sale would be a breach of the injunction." I have not now to determine whether that observation was right or not, but, so far as I am concerned, I can see no reason for saying that it is wrong, and there is nothing in my present judgment which is intended to be inconsistent with it. If you are in substance selling the whole of a patented machine, I do not think that you can save yourself from liability for infringement, because you sell it in parts which are so manufactured as to be adapted to be easily put together. But that is not the present case. What is complained of here is merely the sale of one or other of the parts of the tyres patented by the plaintiffs.

I need not, I think, say any more. But I should like to add that I cannot conceive that the practical result of our judgment will be to inflict any injury upon the plaintiffs. If the parts manufactured and sold by Messrs. Moseley are eventually used for the purpose of making the patented tyres, and thus infringing the plaintiffs' patents, the plaintiffs will have full opportunity of suing those persons who thus infringe their patents, and the fact that the plaintiffs were not able to sue the present defendants for selling some article which might or must be intended for use in making the plaintiffs' tyres would not, in my judgment, practically deprive the plaintiffs of the power to enforce any rights and privileges to which they are entitled as patentees. In my opinion the decision of Swinfen Eady J. ought to be affirmed and the appeal dismissed with costs.

(1) 25 Ch. D. 778. (2) 25 Ch. D. 782.

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STIRLING L.J. I am of the same opinion. The learned counsel for the appellants admitted—and, in my judgment, rightly—that the mere manufacture and sale of the covers which are in question would not constitute an infringement of the patent. *Townsend* v. *Haworth* (1) decides that the sale of the covers would not become an infringement merely because the vendor knew that the purchaser intended to use the article sold to him for the purpose of infringing the patent. In order that the vendor may be liable as an infringer it must be shewn that he has made himself a party to the infringement.

Now in the present case there are two defendants: Messrs. Moseley, the manufacturers of the covers, and the India Rubber Company, who sold the covers and, with the additions, it is said, of other portions of the patented combination. The learned judge, who saw the witnesses, decided that the India Rubber Company had not infringed, and we have not really been asked to overrule his decision on that question of fact. But, assuming that the India Rubber Company did infringe, still, in my opinion, there is no evidence that the manufacturers knew of, still less that they made themselves parties to, any infringement.

I agree with the judgment of Swinfen Eady J., and in particular I desire to adopt as my own this passage in it (2): "Selling these covers to licensees of the plaintiffs is a lawful trade; selling them for export is a lawful trade; but the purchasers, nevertheless, might not export them, and to make the defendants Moseley responsible for the ultimate use of the covers, so as to put upon them the burden of ascertaining whether the purchasers intended to use and used them lawfully, would be imposing upon them a burden which, in my opinion, the law does not impose."

I agree that the appeal ought to be dismissed.

COZENS-HARDY L.J. I so entirely agree with what has fallen from my learned colleagues, and also with the judgment of Swinfen Eady J., that it would not be right for me to add more than a very few words.

It is, I think, almost beyond dispute that the mere manu-

(1) 12 Ch. D. 831, n.; 48 L. J. (Ch.) 770, n. (2) Ante, p. 171.

facture and sale of these covers was perfectly lawful. We have had before us recently another action brought by the same plaintiffs, in which it appeared that one of the licensees of these very patents sells more than 25,000 of the tyres in a year. It is also in evidence that there is a very large export trade in these covers. So far, therefore, as Messrs. Moseley export them, and so far as they supply them to licensees, it is plain that no complaint can be made by the plaintiffs. And, having regard to what was said in argument, I think, speaking for myself, that there may be a third class of cases in which the supply by the defendants might be perfectly lawful—I mean for the purpose of repair. The word "repair" is no doubt a difficult one to construe, but I do not think that *Dunlop Pneumatic Tyre Co.* v. *Neal* (1) justifies the construction which was put upon it by the appellants' counsel. I certainly doubt—I will not say any more than that—whether the holder of a licensed tyre may not replace a worn-out cover without being guilty of an infringement of the patent. It is not necessary to decide that point now, and I only desire to keep that point open for future consideration. That being so, we have here a trade which is not necessarily unlawful—indeed, it seems to me to be plainly lawful—and if that be admitted, *Townsend* v. *Haworth* (2) is a decision of the Court of Appeal which is binding on us, that there is no infringement of the patent by the defendants, even though they sell the covers with the knowledge that the purchaser intends afterwards to use them for the purpose of infringement, or even if they take an indemnity from the purchaser in case of any infringement being committed. As I have said, I think *Townsend* v. *Haworth* (2) is binding on us; and, if I may respectfully say so, I entirely agree with what was there said by Jessel M.R. and by the Lords Justices.

In my opinion this appeal fails, and must be dismissed.

Solicitors: *J. B. & F. Purchase; Rowcliffes, Rawle & Co., for F. A. Woodcock, Manchester; Emmet & Co., for G. W. Fox, Manchester.*

(1) [1899] 1 Ch. 807. (2) 12 Ch. D. 831, n.; 48 L. J. (Ch.) 770, n.

W. L. C.

KEKEWICH J.
1904
Feb. 23.

In re HOUGHTON.
HAWLEY *v.* BLAKE.

[1903 H. 2616.]

Executor—Power of Executor to compromise Claim of Co-executor—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 21—*Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

It is competent for an executor in a proper case to compromise a claim by his co-executor against the estate.

Where an executor, acting honestly and reasonably, allowed, after inquiry, a claim by the testator's widow, who was co-executrix of the will, to a large sum of money which as she alleged belonged to her, but was represented by securities apparently belonging to the testator:—

Held, that the transaction was valid and binding on residuary legatees.

ADJOURNED SUMMONS.

Charles Houghton, by his will, dated February 23, 1889, gave the income of his estate to his wife, Esther Houghton, for life, and directed that after her death his residuary estate should be realized, and the net proceeds divided amongst his nephews and nieces; and he appointed his wife, the defendant John S. Blake, who was his wife's nephew, and the defendant Ferdinand Houghton, executors of his will.

The testator died on April 1, 1894, and his will was proved by his widow, and the defendant Blake, power being reserved to the defendant Ferdinand Houghton to prove, which power he had not exercised.

The widow died on June 7, 1902, having appointed the defendant Blake sole executor of her will.

In May, 1903, the defendant Blake, as surviving executor of the will of Charles Houghton, delivered to the residuary legatees an account of the administration of the testator's estate.

The account on the credit side contained the following entry: "April 1. Shares, &c., allocated to Mrs. Houghton in discharge of moneys belonging to her separate estate and lent to the deceased (see contra), 1180*l.*" On the debit side were particulars of various shares, and 155*l.* "cash proportion of a

debt," the shares being stated to be "allocated to Mrs. Houghton at current price in part discharge of 1180*l.* due to her as per contra."

The gross estate of the testator amounted to 2208*l.*

It appeared that, shortly after the death of Charles Houghton, the defendant Blake had an interview with Mrs. Houghton with reference to obtaining probate of the will. At that interview Mrs. Houghton took out of an iron safe a number of securities, and told Blake that they did not all belong to her husband, but that a great deal of the money which they represented was hers, and came partly from her father and partly from her mother through her father, amounting in all to 1180*l.*, and she shewed him a memorandum of four items making up such sum.

The defendant Blake then consulted the firm of solicitors employed in the administration of the testator's estate with reference to this matter, and made some inquiries in the family, and certain receipts were produced to him which shewed that Mrs. Houghton was entitled to the amount she claimed either from her father's estate or from her mother's, though as to some portion of the moneys it did not appear that she was entitled for her separate use. In these circumstances he raised no objection to her claim being admitted, and to her being allowed to retain securities to the amount of the debt.

The residuary legatees declined to recognise the validity of these proceedings, and took out this summons for an inquiry what amount, if any, was owing to Mrs. Houghton from her late husband, and for a direction that all moneys, shares, and property retained by Mrs. Houghton out of the estate of the testator in alleged discharge of moneys alleged to be owing to her from him might be paid or transferred by the defendant Blake, as executor of Mrs. Houghton, into the names of himself and the defendant F. Houghton, to be applied as part of the residuary estate of the testator; and for the administration, if necessary, of the estate of Mrs. Houghton for that purpose.

As to the sum of 820*l.*, part of the 1180*l.*, it was proved to the satisfaction of the Court that Mrs. Houghton was entitled

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HOUGHTON, *In re.*
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thereto as her separate estate, but as to the balance of the moneys there was no evidence that she had any title as against her husband. The solicitor whom the defendant Blake had consulted (as above stated) was dead.

Christopher James, for the plaintiffs. It is submitted that this alleged compromise was invalid as against the residuary legatees. It is not competent for one executor to compromise the claim of his co-executor against the estate. There is no authority for the existence of such a power, and in *De Cordova* v. *De Cordova* (1) Sir Barnes Peacock in delivering judgment intimated that no decision can be found that executors can compromise a debt due from one of themselves, and referred to *Cook* v. *Collingridge* (2) as a decision that an executor cannot compromise a debt due from himself to the estate, and that the Court will not inquire into the matter, but will at once say that such a transaction cannot stand. In this case, as in *De Cordova* v. *De Cordova* (1), the compromise was unfair and prejudicial to the estate. One executor makes a claim, and the other admits it. It is impossible that in such a case the executor should exercise an independent judgment, as he is bound to do, and could do in the case of a stranger.

Warrington, K.C., and *T. Ribton*, for the defendant Blake. It is submitted that the transaction was a proper compromise within the powers of the executor under s. 21 of the Trustee Act, 1893. There is no suggestion that this executor did not act honestly and reasonably.

KEKEWICH J. This is a claim by beneficiaries under the will of Charles Houghton to a sum of 1180*l.* received by the widow Esther Houghton, and for which it is alleged that the estate of Esther Houghton became accountable; and the summons asks, if necessary, for administration of her estate for that purpose. As regards 820*l.*, receipts have been received which clear the matter up entirely. There is no doubt that 820*l.* really belonged to Esther Houghton. The story is a

(1) (1879) 4 App. Cas. 692.
(2) (1823) Jac. 607; 23 R. R. 155, 767.

curious one. Esther Houghton was the widow of Charles Houghton; John S. Blake was co-executor with her of Charles Houghton, and on Charles Houghton's death Esther Houghton, the widow, produced a number of securities, and said that they did not all belong to her husband's estate, but some, amounting altogether to 1180*l.*, belonged to her. Blake went into the matter more or less, but eventually he did not object to her claim and allowed her to retain the securities. It is said that he did wrong, and that, therefore, the money is now recoverable from him as executor of Esther Houghton, which he also happens to be. The question is whether John S. Blake, as one of the executors of Charles Houghton, could compromise this claim with Esther Houghton by allowing it in full. I use the word compromise advisedly. No doubt there was no give and take. Esther Houghton had all she claimed, and in that sense there was no compromise. On the other hand, she had possession of the securities; they could only be got from her by discussion, and perhaps litigation. It was entirely for those representing the estate to say whether there should be litigation, with delay and costs, or whether the claim should be acceded to. That is a compromise. Very little was given up, but there was a reason for the transaction, when the possibility of litigation and its consequences are considered. I think therefore that, if honest, it was a compromise. About the honesty there is no doubt. No imputation has been made on the honesty of J. S. Blake or Esther Houghton. Therefore I come to the question whether it was competent to J. S. Blake, as one of the two executors, to admit the claim of his co-executrix, particularly when the co-executrix was the widow of the testator. The latter fact seems to me to make no difference; she was not a stranger as regarded his estate, but she was a stranger as to the claim, and the compromise of it, notwithstanding that she was also co-executrix. So that we are brought down to the question whether one of two executors can make a compromise with the other executor. Very large powers of compromising are given to an executor by the common law; he has also statutory authority, but the statutory authority really adds nothing to the common law powers,

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which have been recognised again and again, and were recently recognised in terms in the case of *In re New* (1) in the Court of Appeal. Executors are seised of their office per mie et per tout; each of them represents the estate for all purposes. I think I should be infringing on that rule if I were to say that one executor could not compromise the claim of his co-executor. The position, however, is a delicate one, and an executor in that position would do well to apply to the Court for direction as to whether he is at liberty to make the compromise. But under the Judicial Trustees Act, 1896, I should have to consider whether he "acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach." Upon the latter point I cannot form an opinion; I cannot say whether he ought to have applied to the Court, but I have no doubt that he acted honestly and reasonably. Therefore, whether I take the case simply on his executorial power, or whether I take only the last statute to which I have referred, it seems to me that I must uphold this executor as having done what is right.

Solicitors: *Clarke, Rawlins & Co., for Percival & Son, Peterborough; Field, Roscoe & Co., for Senior & Furbank, Richmond, Surrey.*

(1) [1901] 2 Ch. 534.

C. C. M. D.

BYRNE J.
1904
Feb. 11, 27.

In re BROWN & GREGORY, LIMITED.
SHEPHEARD *v.* BROWN & GREGORY, LIMITED.

[1901 B. 4792.]

ANDREWS *v.* BROWN & GREGORY, LIMITED.

[1901 B. 4847.]

Company—Debenture—Debenture-holder's Action — Transfer of Debenture — Claim by Company against Transferor—Registered Holder—Rights against Transferee—Trustee for Creditors.

Debentures in a limited company were assigned by a firm, with other property, to P. as the trustee of a creditors' deed, and P. was registered as the holder of these debentures. The conditions on the debentures provided that the money thereby secured should be paid without regard to any equities between the company and the original or any intermediate holder, and that the registered holder would be regarded as exclusively entitled to the benefit of the debenture, and that the company should not be bound to enter in the register notice of any trust, or to recognise any right in any other person. The firm owed the company 1666*l.*, and the master had certified that the property comprised in the debentures included this debt. On application by the debenture-holders for the distribution of a fund in court in this action in payment of a dividend to the debenture-holders:—

Held, that P. as assignee of the firm was in no better position than his assignors, being simply general assignee in trust for creditors (neither the company nor the debenture-holders having come in under the deed), and he could only be entitled to the debentures subject to the same equities as his assignors were subject to; that the conditions in the debentures did not prevent the company or the debenture-holders from insisting upon their rights against P., just as they could have insisted against his assignors, and that P. must therefore bring into account the 1666*l.* before he could share in the fund now ready for distribution.

In re Goy & Co., [1900] 2 Ch. 149, discussed and distinguished.

FURTHER CONSIDERATION.

The only question raised on the further consideration of these consolidated debenture-holder's actions was whether one A. C. Palmer, as the registered holder of debentures in the company and as assignee of the assets of a firm of Samuel Smith & Co., was entitled to share in the distribution of a fund in court, without first paying or bringing into account a debt

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due to the company from the firm. The master's certificate was not very clear, and the evidence as to the assignment of these debentures to Palmer was not satisfactory; but the facts as found by the Court, and so far as material, were as follows:—

By a deed of February 3, 1902, thirty-one 100*l.* debentures in Brown & Gregory, Limited, with all the joint and several property of the firm of Samuel Smith & Co., were assigned by Samuel Smith & Co. to A. C. Palmer as the trustee of a creditors' deed. By each of these debentures, which formed part of a larger issue, the company charged its undertaking and all its property in the usual way, and bound itself to pay the money thus secured to the registered holder for the time being.

The conditions indorsed upon the debentures provided, inter alia, (2.) "the principal moneys, bonus, and interest hereby secured will be paid without regard to any equities between the company and the original and any intermediate holder." (3.) The receipt of the registered holder was alone to be a good discharge for the principal and interest thereby secured. (11.) "The registered holder hereof will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly, and the company shall not be bound to enter on the register notice of any trust, or to recognise any right in any other person save as therein provided."

Palmer was duly entered on the register of the company as the holder of these thirty-one debentures.

The firm of Samuel Smith & Co. owed the company 1666*l.* odd, and the master had certified that part of the property included in the debentures consisted of this debt.

Neither the company nor the debenture-holders had executed the deed of assignment of February 3, 1902.

There was a fund now in court available for distribution in payment of a dividend to the debenture-holders, and the contention on behalf of the debenture-holders was that Palmer, as assignee of Samuel Smith & Co., could not share in the dividend without first paying or bringing into account this 1666*l.*

Rowden, K.C., and *Hon. T. Watson*, for the plaintiffs, the debenture-holders. Palmer, as assignee of the firm of Samuel Smith & Co., must make good the debt due from the firm to the company before he can take any share in the dividend; or this debt can be set off against anything Palmer would take in the way of dividend: the principle is recognised in *In re Goy & Co.* (1) Palmer is not an independent transferee as Robey was in that case. Palmer is trustee for the creditors of the firm, and as assignee of the firm's assets he cannot be in any better position than the firm would have been in if it had never assigned these debentures to him and was still the registered holder. There is a good cross-claim by the company against Palmer for this 1666*l.* Palmer or the firm through whom he claims have had this money, and he can pay himself out of that; he has no right to receive anything until he has discharged his obligation to contribute: this principle has been acted on in administration cases in *In re Akerman* (2) and *In re Watson* (3), and in the case of companies in *In re Auriferous Properties.* (4) Assuming Palmer is in no better position than the firm of Samuel Smith & Co., it does not matter that we cannot sue Palmer for this debt: *In re Akerman.* (2) The observations of Stirling J. in *In re Goy & Co.* (1) seem to shew that the whole debt can be set off against a dividend on account of what is owing on the debentures. Palmer as trustee for creditors is the person to pay this 1666*l.*; he is also registered holder of the debentures, but under these circumstances conditions 2 and 11 do not apply.

Norton, K.C., and *Hon. M. Macnaghten*, for Palmer, in his capacity of trustee of the creditors' deed. Palmer is the registered holder of these debentures, and he is by condition 11 to be regarded as exclusively entitled to the benefit of these debentures, which by condition 2 are to be paid without any regard to any equities between the company and the original or any intermediate holder. Palmer, the registered holder, does not owe the company anything, and consequently is not

(1) [1900] 2 Ch. 149.
(2) [1891] 3 Ch. 212.
(3) [1896] 1 Ch. 925.
(4) [1898] 2 Ch. 428.

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bound to bring this 1666*l.* into account. The most the plaintiffs can get from Palmer is a dividend on the firm's estate in respect of this 1666*l.*, and they have no right to any dividend until the 3100*l.* owing on these debentures has been paid. The plaintiffs cannot set off the debt against a dividend; they can only set off a debt against a debt, or a dividend against a dividend. Stirling J. in *In re Goy & Co.* (1) does refer to a right to receive a dividend out of the property comprised in the debentures, with a liability to contribute to that same property the debt; but the equity which applies in certain cases does not apply in the distribution of a creditors' fund. Except for the observations of Stirling J. in *In re Goy & Co.* (1) there is no authority on this point, and the observations of Stirling J. are only obiter. This is not an application in the winding-up of the company. *In re Akerman* (2) and *In re Auriferous Properties* (3) are distinguishable. Palmer as registered holder, being in no way indebted to the company or to the debenture-holders, is entitled to his share in the fund in court with the other debenture-holders, without having to account for this 1666*l.*

Hon. T. Watson, in reply. This is not a case of set-off. The dictum of Stirling J. in *In re Goy & Co.* (1) was made after full consideration of *In re Akerman* (2), *In re Watson* (4), and *In re Auriferous Properties* (3), and clearly states the principle applicable in this case.

Cur. adv. vult.

Feb. 27. BYRNE J. There is a fund in court in a debenture-holder's action now available for distribution in payment of a dividend in respect of the amounts due on the debentures.

Mr. Palmer is entitled as assignee to certain of these debentures under a deed dated February 3, 1902, whereby, except onerous property and the separate property belonging to Samuel Smith, all the joint and several property of the firm of Samuel Smith and its members was assigned to him as trustee for creditors. I have only been able to get at the

(1) [1900] 2 Ch. 149.
(2) [1891] 3 Ch. 212.
(3) [1898] 2 Ch. 428.
(4) [1896] 1 Ch. 925.

actual facts after a careful perusal, not only of the master's certificate, but also of the evidence upon which it was founded, because there was a certain ambiguity upon the certificate, and because there was some colour for a plausible argument arising out of the fact that the debentures were standing in the name of Smith alone, and that Smith had made another assignment, also to Palmer, of his separate estate; but I am satisfied by the affidavit of Palmer and the joint affidavit of Palmer and Samuel Smith that the debentures belonged beneficially to the firm, and that Palmer claims the debentures as assignee of the firm's assets. The master's certificate also finds that part of the property subject to the debentures consists of a debt of 1666*l.* 8*s.* 11*d.*, due from the defendant Samuel Smith or his firm. I find as a fact that it was due from the firm.

I can so far clear the way by stating that I am satisfied that Palmer's title to the debentures depends, as he himself claims, upon the assignment from the firm, and that the debt was a debt due (as Palmer also proves) from the firm to the company.

There is no question of set-off arising, and I do not see that there is any difference in point of principle because the item of property charged happens to be a debt rather than some other item, as, for instance, a sum of Consols in the name of Palmer as trustee by virtue of the assignment.

The contention on the part of the other debenture-holders is that Palmer cannot, as assignee, share in the dividend without paying or bringing into account the whole amount of the debt.

There is no doubt as to the general principle applicable. It is stated by Stirling J. in the case of *In re Goy & Co.* (1): "It has been repeatedly held inequitable that a person entitled to a share of a fund should receive anything in respect of that share without paying what he may be found to contribute to the same fund. Under such circumstances the Court in effect says to the person claiming to be paid, 'You have in your own hands that which is applicable to the payment—pay yourself out of that.' This has been done on the distribution of the residuary estate of a testator where a person entitled to a share

(1) [1900] 2 Ch. 149, 153.

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is also indebted to the estate: *Willes* v. *Greenhill* (1); *In re Akerman* (2); *In re Watson.* (3) Where two companies were in liquidation and one held shares in the other, and was at the same time a creditor, it was held that the creditor could not take any dividend until all calls due on the shares were paid: *In re Auriferous Properties.* (4) In *Ex parte Theys* (5) Cotton L.J. said that probably the principle was applicable to the distribution of a fund to which debenture-holders were entitled."

It is argued on behalf of Palmer that he is in the position of holder of the debentures, that he owes nothing to the company, and that, therefore, the doctrine I have referred to does not apply. When the facts are arrived at the real question resolves itself into this, namely, whether or not Palmer, as assignee of the firm's assets, can be in a better position than the firm would have been in if they had never assigned, and had been the registered owners of the debentures. Palmer is entitled to be registered as owner of the debentures only by virtue of the assignment by Smith and his co-partners as trustee for them, subject to satisfying creditors who may execute the deed, and Smith and his co-partners are liable to pay the debt. In my opinion Palmer, as assignee, is in no better position than his assignors, being simply general assignee in trust for creditors (neither the company nor the debenture-holders having come in under it), and he can only be entitled subject to the same equities as his assignors were subject to. He is not in the position of a bonâ fide purchaser for value as was the assignee in the case of *In re Goy & Co.* (6) [His Lordship then referred to conditions 2 and 11 of the debentures, and continued:—]

This does not, in my opinion, prevent the company or the debenture-holders from insisting upon their right as against Palmer, just as they could have insisted against his assignors. He only holds under the deed as trustee for them as against those creditors who have not come in under the deed. I

(1) (1860) 29 Beav. 376.
(2) [1891] 3 Ch. 212.
(3) [1896] 1 Ch. 925.
(4) [1898] 2 Ch. 428.
(5) (1884) 25 Ch. D. 587, 593.
(6) [1900] 2 Ch. 149.

think Palmer must bring into account the 1666*l.* 8*s.* 11*d.* before he can claim to share in any dividend: that means he cannot share in the amount now to be divided.

The right method of division appears to me to be to add 1666*l.* 8*s.* 11*d.*, for the purpose of computation, to the amount available for division, and then to pay the other debenture-holders all they are entitled to upon that footing so far as the actual fund will extend.

If there should be any future distribution the payment now made will be brought into account, regard being had to the then state of circumstances. I can easily imagine the rights being altered by other events, as, for instance, by the company or the debenture-holders receiving any payment under the deed, there being a release contained in it by assenting creditors in the usual form.

Solicitors: *Collyer-Bristow, Hill, Curtis, Dods & Booth, for Stone, Simpson & Mason, Tunbridge Wells; James, Mellor & Coleman.*

W. C. D.

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1904

Feb. 26;
March 3.

VEZEY *v.* RASHLEIGH.

[1902 V. 748.]

Specific Performance — Land — Contract — Rescission — Variation — Parol Evidence — Statute of Frauds.

Parol evidence is not admissible to prove a subsequent agreement to vary the terms of a contract in writing and by law required to be in writing, although it can be admitted to prove rescission of such a contract.

MOTION.

In an action brought for a declaration that a mining lease of August 15, 1901, was a good and existing lease and had not been forfeited, an order was made on November 5, 1903, that all further proceedings in the action except such as might be necessary for the purpose of carrying into effect the compromise set forth in the schedule thereto should be stayed. The schedule provided that, (1.) the lease of August 15, 1901, should be treated as determined; (2.) that a new lease of the premises comprised in the lease of August 15, 1901, should be granted by the defendant to the plaintiff at a rent of 50*l.* per annum for the term of twenty-one years, to include all plant, buildings, and effects then on the mine, and to be in the same terms as the lease of August 15, 1901, with the exception that the lessee was not to be bound to strike a new shaft.

An interview took place between the plaintiff and the defendant on December 11, 1903, at which the terms of the proposed lease were discussed. Alterations were suggested and agreed to, and the result embodied in a memorandum of which each of the parties signed a copy and the copies were exchanged. This document was headed, "Topics of conversation between Sir Colman Rashleigh and Mr. Vezey *re* leases of S. Prideaux Wood and St. Blazey Mines. Heads of leases to be submitted to our respective solicitors, viz., leases for taking over two old mines, where all necessary shafts have been made years ago, all the buildings being in ruins, and machinery cleared away or nearly so; all present surface drainage up to present time is

taken as paid for." This was followed by the suggested terms, which were described as "Heads of leases of Prideaux Wood and St. Blazey Consols Mines."

These documents were sent by the parties to their solicitors. The defendant's solicitors objected to several of the proposed alterations, and the plaintiff insisted upon them as forming part of a new contract made, as he alleged, at the interview. The defendant therefore served this notice of motion, asking that the plaintiff might be ordered to execute the lease in compliance with the terms of the agreement contained in the schedule to the order.

Norton, K.C., and *G. B. Rashleigh*, for the motion.

Rowden, K.C., and *A. J. David*, for the plaintiff. The agreement contained in the order has been rescinded by the second agreement which was made at the interview. We are entitled to rely on the memorandum, and also to give parol evidence of what took place at the interview: Fry on Specific Performance, 4th ed. p. 443, pars. 1021, 1022, 1024. A contract in writing and by law required to be in writing may in equity be rescinded by parol. It is true that this is not a contract to rescind in so many words, but it is an agreement between the parties to new terms which put an end to the terms of the old contract: par. 1020 (ii.). In *Moore* v. *Marrable* (1) the circumstances in which the second contract was signed were admitted as evidence. This evidence will throw so much doubt on the first contract that the Court will not order specific performance of it.

Norton, K.C., in reply. No parol evidence can be admitted to shew what contract was made at this interview. Any alteration in a contract required by law to be in writing, as distinguished from a rescission, must itself be in writing: Fry on Specific Performance, 4th ed. pp. 443, 445, 448, pars. 1024, 1028, 1039; *Moore* v. *Marrable*. (2) The so-called contract made at the interview was not to rescind but to vary the first contract. That is not sufficient to take it out of the rule. The only exception is in the case of a complete novation: *Price* v.

(1) (1866) L. R. 1 Ch. 217, 220. (2) L. R. 1 Ch. 217, 222.

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Dyer (1); *Robinson* v. *Page*. (2) The memorandum was not an agreement; it was only a statement of terms: *Pattle* v. *Hornibrook*. (3)

BYRNE J. stated the facts, and continued:—The first question is, taking the memorandum of December 11 by itself, does it amount to an agreement by the parties to rescind the agreement contained in the order? I do not think it was intended to operate as an agreement at all. I cannot think that a business man like the plaintiff would be content to accept as an agreement a document headed "Topics of conversation." The question, therefore, is how far I can receive parol evidence to prove what took place at the discussion between the parties. It appears to me that the decisions in *Price* v. *Dyer* (1) and *Robinson* v. *Page* (2) shew that although to prove rescission of a written contract I can admit parol evidence of a subsequent agreement, that means evidence of an agreement for rescission only, and I cannot admit parol evidence of an agreement to vary the terms of the contract.

In *Price* v. *Dyer* (4) the Master of the Rolls said: "It is then said, that the agreement was waived; and that a written agreement may be so far waived by parol, that the Court will refuse the interposition of its equitable jurisdiction to enforce it. Not conceiving, that there was in this case any waiver, within the meaning of the dicta, or decisions, upon this subject, it is not necessary for me to give a precise opinion upon the point; but, as at present advised, I incline to think, that upon the doctrine of this Court such would be the effect of a parol waiver, clearly and satisfactorily proved: but here was no such waiver. The waiver spoken of in the cases, is an entire abandonment and dissolution of the contract; restoring the parties to their former situation. No such thing was for a moment in the contemplation of these parties. From the history of the transaction, in the answer and the evidence of

(1) (1810) 17 Ves. 356, 364; 11 R. R. 102.
(2) (1826) 3 Russ. 114, 121; 27 R. R. 26.
(3) [1897] 1 Ch. 25.
(4) 17 Ves. 363; 11 R. R 106.

the solicitor, all they at any time meant was to add to or modify the terms of the original agreement." Here I may say that although there is a contradiction between the parties, there is no contradiction on this point that all that was intended at the interview was a variation in the terms of the first agreement.

In *Robinson* v. *Page* (1) the Master of the Rolls said: "Now, in the whole of this transaction, it does not appear to me, that, when the treaty was entered into for this variation, there was any intention in the mind of the parties to abandon the original contract. It is laid down in the authority I have referred to, that, where parties have entered into a binding agreement in writing and variations are afterwards introduced by parol, or by an instrument not signed according to the Statute of Frauds, these variations are not sufficient to prevent the execution of the agreement, and are no answer to a bill for specific performance. Therefore, even on the case stated by the defendant as to this part of the transaction, the plaintiff would be entitled to the relief he prays." I think, therefore, that in this case Sir Colman Rashleigh is entitled to have the terms of the agreement as they appear in the schedule to the order carried out; and there will be a reference to chambers to settle the terms in case the parties differ. (2)

Solicitors: *W. H. Martin & Co.; Rashleigh, Son & Hall.*

(1) 3 Russ. 121; 27 R. R. 29.

(2) See also *Noble* v. *Ward*, (1867) L. R. 2 Ex. 135.—F. P.

H. C. R.

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1904
March 10, 11.

In re NIXON.
GRAY *v.* BELL.

[1899 N. 425.]

Administration—Leaseholds—Contingent Future Liabilities—Retention of Assets—Executor—Indemnity—Privity of Estate—Distribution.

On making an order for the distribution of the estate of a testator amongst his residuary legatees the Court will not set aside any part of his assets to indemnify his executors against possible liabilities which may arise in respect of leases formerly held by him, unless there is privity of estate between the executors and the lessors.

FURTHER CONSIDERATION.

John Nixon by his will gave all his residuary estate to trustees upon trust for sale and conversion, and died in 1899. His executors and trustees issued the statutory advertisements; paid all his debts and legacies; set apart a sum of 180,000*l.* to answer an annuity of 5000*l.* given by him to his wife for life, a sum of 10,000*l.* in respect of a legacy settled by his will, and a sum of 65,900*l.* which they claimed to be entitled to retain, with the accumulated income thereof up to 1000*l.* per annum, for the purpose of indemnifying themselves against contingent liabilities which might arise in respect of leaseholds formerly the property of the testator. The question now in dispute was whether they were entitled to retain this sum. The testator had in his lifetime been engaged in two businesses as a colliery proprietor under the names of Nixon, Taylor & Cory and the Western Merthyr Coal and Fuel Company. The firm of Nixon, Taylor & Cory was carried on till 1881 by fourteen partners, and a number of mining leases were held by Mr. Nixon and various members of the firm on behalf of the partnership. In 1882 a company called Nixon's Navigation Company, Limited, was formed to take over the business. By the articles of the company part of the unpaid capital of the company, amounting to 31,200*l.*, was constituted a special fund to indemnify the late partners against (inter alia) liability in respect of the leases. Most of the leases, including the

only one of which the testator was sole lessee, were assigned to the company, but a few were retained by the partners, as licences to assign them could not be obtained. Of these leases the lessees executed declarations of trust as joint tenants in favour of the company, the result being that none of these leases devolved upon the testator's executors. By an indenture of March 18, 1882, the company covenanted with the partners and each of them to discharge the liabilities of the partnership, and to pay the future rents and royalties reserved by and perform the covenants contained in the leases, and to indemnify the partners in that respect, and, further, that the above-mentioned part of unpaid capital should be charged with payments due under the covenant of indemnity. The partners covenanted by the same deed with all and each of the other partners that any losses borne by them by reason of their being trustees of the leases and not met by the company should be paid by themselves in proportion to their capital. There were a large number of mining leases of which the testator was a lessee. Some of them had been acquired by him by assignment, and of some he was an original lessee. Many of them were for long terms and at heavy rents.

The testator similarly held other leases in respect of his firm of the Western Merthyr Coal and Fuel Company. In 1881 his interest in the firm was assigned to other persons, who jointly and severally covenanted with him to pay the rents and perform the covenants of the leases. One of these persons, Mr. J. G. Kershaw, had since died, and in an action for the administration of his estate the Court made an order in December, 1900, that securities of the face value of 42,182*l.* 10*s.* should be set apart to answer any liability that might arise under the leases.

In April, 1903, upon an originating summons an order was made for accounts and inquiries and the administration of Mr. Nixon's estate.

In July, 1903, the executors repeated the advertisements to creditors, but they had not received any claim in respect of liability under any of these leases.

The action now came on on further consideration, and one

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of the residuary legatees asked that the executors might be ordered to distribute the 65,900*l.* instead of retaining it.

Norton, K.C., and *E. Ford*, for the applicant. There were joint and several covenants in these leases by which the executors are still bound, although the leases never actually vested in them. But we submit that no assets ought to be retained to meet this liability. The case is governed by the law as it stood before Lord St. Leonards' Act (22 & 23 Vict. c. 35). That Act does not apply, for these leases did not come to the executors as such, nor have the executors assigned them to purchasers, within s. 27; and the executors had notice of the liability as mentioned in s. 28. Both before and after the Act the Court has never been in the habit of setting aside assets to meet such a remote possible liability: *Jervis* v. *Wolferstan* (1); *Reilly* v. *Reilly*. (2) No Court has ever gone so far as to direct an inquiry whether a testator had ever at any time of his life been possessed of a lease. No such inquiry has ever been considered necessary, and no assets have ever been set apart to meet a liability under a lease unless the lease had actually become vested in the executors. The principle on which funds were set apart cannot be clearly ascertained from the authorities. In *King* v. *Malcott* (3) it is said that a lessor has no right to have any of his lessee's assets impounded to answer future rent and covenants; if any funds are appropriated for that purpose it is from the right of the executor to indemnity. That is probably the true reason, although in *Dodson* v. *Sammell* (4) the principle is said to be doubtful. The authorities shew that the law on this subject is in an unsatisfactory state, but we submit that it is only when there is privity of estate between the lessor and the executor that the Court directs assets to be appropriated as an indemnity. It makes no difference whether the testator was an original lessee or an assignee of the lease. If he has covenanted to indemnify the assignor his liability to the lessor is the same, although the lessor may find it more difficult to recover. In

(1) (1874) L. R. 18 Eq. 18, 25, 26.
(2) (1865) 34 Beav. 406.
(3) (1852) 9 Hare, 692.
(4) (1861) 1 Dr. & Sm. 575.

the present case all the leases were parted with in the testator's lifetime, and there is no privity of estate between the executors and the lessors. If executors are in possession of leaseholds there must be something accruing due from them to the lessor from day to day; they therefore require protection, for the order of the Court to distribute the estate will not protect them in respect of that liability. If these leases had become vested in the executors and had been assigned by them, they would have been protected by Lord St. Leonards' Act, and no indemnity would have been necessary. Why should they be in a worse position because the testator parted with the leases in his lifetime? Executors are entitled to an indemnity if, and only if, the leaseholds are in their hands. They are then the primary persons to pay these liabilities, and cannot plead plene administravit.

It is unnecessary to reserve funds for this purpose. If an executor fairly represents everything to the Court, a decree directing him to distribute the property must operate as a complete indemnity to him, and he cannot need any other indemnity: *Smith* v. *Smith* (1), which was not a case under Lord St. Leonards' Act; Carson's Real Property Statutes, pp. 532, 535; *Dodson* v. *Sammell.* (2) That was the rule before Lord St. Leonards' Act was passed: *Waller* v. *Barrett.* (3)

If the executors have distributed the estate the lessor can sue the residuary legatees without making the executors parties: *Hunter* v. *Young.* (4)

[BYRNE J. If the estate is distributed and the executors are no longer under any liability, how can they assert in favour of their cestuis que trust their right to be indemnified by the purchasers of the leaseholds?]

The executors would be treated as trustees of the right to indemnity for the residuary legatees. They could assign the right to them or keep it as trustees for their benefit: *In re Perkins.* (5)

In the present case there is an ample margin of assets, and there will be no risk in distributing the 65,900*l.*

(1) (1861) 1 Dr. & Sm. 384, 387.
(2) 1 Dr. & Sm. 575.
(3) (1857) 24 Beav. 413.
(4) (1879) 4 Ex. D. 256.
(5) [1898] 2 Ch. 182.

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Rowden, K.C., and *Davenport*, for the executors and the other beneficiaries. We do not oppose this application, but it is our duty to see that all the circumstances are laid before the Court. We admit that the suggested order would be a sufficient protection for the executors, and that Lord St. Leonards' Act does not apply. But the liabilities are very heavy, and the leases themselves are not of sufficient value as an indemnity. There are not in this case clear covenants to indemnify the testator; there are cross-covenants by him also.

The settled practice of the Court has always been to set aside assets as an indemnity, and there is no trace of a suggestion that the principle upon which the Court has acted was to distinguish between cases where there was, or was not, privity of estate. In Lewin on Trusts, 10th ed. pp. 509, 510, it is said that the doctrine does not seem to be founded on sound principle.

Executors are always indemnified if there is any liability: *Garrett* v. *Lancefield*. (1) In the old administration orders inquiries about leaseholds and the liabilities thereunder were usual: Seton on Decrees, 4th ed. p. 889. There seems to have been a doubt on what principle that was done: *Fletcher* v. *Stevenson*. (2) *King* v. *Malcott* (3) was only a decision that the lessor could not claim to have funds retained as an indemnity.

Moule v. *Garrett* (4) shews that the distinction drawn by the Court really rests upon privity of contract. Where the testator was an original lessee the indemnity was never dispensed with. In *Bunting* v. *Marriott* (5) an indemnity fund was set aside for the benefit of the lessor, although that was not followed in *Sowdon* v. *Marriott*. (6)

Norton, K.C., in reply.

BYRNE J. The testator in this case left a very large estate. There is a sum of 180,000*l*. still remaining vested in the trustees and executors which is appropriated to meet an annuity of 5000*l*. for the testator's widow, reducible in the

(1) (1856) 2 Jur. (N.S.) 177.
(2) (1844) 3 Hare, 360.
(3) 9 Hare, 692.
(4) (1872) L. R. 7 Ex. 101.
(5) (1861) 7 Jur. (N.S.) 565.
(6) (1873) 21 W. R. 808.

event of her subsequent marriage to 1000*l.* a year. There is a sum of 10,000*l.* set apart for legacies; and, further, there is a sum of 65,900*l.* which has been kept as an indemnity fund against possible liabilities in respect of certain leasehold interests which the testator formerly held. The applicant represents three twenty-fourths of the residuary estate. He has one twenty-fourth, and is also acting in the interest of others who hold two twenty-fourths. The remainder of the estate is represented by the opponents. I call them opponents because, although they have recognised the fact that if I make such an order as is asked for the executors will be amply protected, yet they have thought it their duty, and properly so, to bring before me certain considerations shewing why I ought not to part with the fund in question without providing an indemnity.

Now in this case there have been advertisements issued for creditors, and there has been an inquiry, the result of which has shewn that there are a considerable number of leasehold properties which were formerly vested in the testator either jointly or alone, as to which by virtue of certain covenants there is a possible liability to a very large amount, but that some of these were assigned by the testator in his lifetime to a company which is known as Nixon's Navigation Company. The rest of the leases were vested in the testator and his partners as joint tenants. His surviving partners still hold them, but as trustees for Nixon's Navigation Company. There were other leaseholds held by the testator in connection with another business which were assigned to an assignee named Kershaw in the lifetime of Mr. Nixon. So there is no question of dealing with leasehold interests which have fallen to the executors and are vested in them, in which case there would be privity of estate between the executors and the lessors.

The real point that lies at the root of the argument which I have heard is this. It is said that the practice which has constantly been acted upon by the Court of retaining funds to answer possible liabilities arising under leases applies only where there is privity of estate, and not in cases where the liability subsists only because the testator formerly held the

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leases. A great many authorities have been cited, and with this result. Most undoubtedly the origin of the reason for retaining funds has been attributed to various causes by different judges at different times. On the one hand, it has been frequently put as being for the indemnity of the executors lest they should be sued; and, on the other hand, it has been said that the principle really is that the Court in administering assets is looking after the interests of persons who, although they have no present right to claim anything and may never have any claim against the estate, still are persons who may in the happening of certain events have claims which ripen against the estate. Of the cases cited I think I can fairly select two as shewing best how the matter stands apart from Lord St. Leonards' Act. I ought to say at once that Lord St. Leonards' Act has no application to the present case, because it applies only to a case where there has been an assignment by executors to a purchaser. That is admittedly not the position in the present case.

The first case I desire to refer to is *King* v. *Malcott* (1), before Turner V.-C. There there was a claim by a lessor for the administration of the estate of his lessee, and he asked to have a sufficient amount out of the assets impounded to answer future possible breaches of covenant in the lease. The Vice-Chancellor dismissed the bill, and in the course of giving judgment he says (2): "If the testator were a tenant of leasehold premises, and no rent be due from him, no debt is proveable by the lessor under that decree in respect of any such rent. The Court, in the administration of the estate, deals with the legal rights of the parties; and the Court in such a case finds nothing in fact due at law to the lessor from the testator or his estate. But, suppose that rent afterwards becomes due, and that proceedings are or may be taken by the landlord, what is then the course of the Court? The proceedings must be against the executor; and on the application of the executor, the Court refers it to the master to ascertain what is due to the lessor and what provision should be made for the future in respect of the obligations arising from the

(1) 9 Hare, 692. (2) 9 Hare, 694.

lease; and a sum of money is commonly set apart to answer what may be required. This course is taken, not because of any right which the creditor has to come in under the decree, but in consequence of the right of the executor to an indemnity against legal liabilities out of the assets. The creditor, not being so at the time of the decease of the testator, but having afterwards become a creditor by reason of the testator's covenant, was not entitled to go in under the decree." The Vice-Chancellor proceeds to inquire why the lessor should have any such right, and considers it is not the result of the relation between landlord and tenant. Then he says: "Why should a Court of Equity give a more extended effect to the obligation contracted between a landlord and tenant than is given by a Court of Law?"

Kindersley V.-C. on more than one occasion had to consider the meaning of the practice as established. I refer to the case of *Dodson* v. *Sammell* (1), which was a case where a fund which had been set apart out of residue to indemnify executors in respect of leaseholds of the testator was ordered to be paid out to the residuary legatee, "such indemnity, since the passing of the Law of Property Amendment Act, being no longer necessary." An application was made for payment out. The Vice-Chancellor says (2): "The law upon this subject is in a very unsatisfactory state. For a long time it has been the practice of the Court, where the property comprised in the lease did not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability, which might in any reasonable probability arise, by reason of a future breach." Then the Vice-Chancellor proceeds to say: "As to the ground of indemnity to the executor or administrator, it is difficult to reconcile such a ground with the acknowledged principle, now at least well settled, that a decree or order of the Court directing the administration and application of the assets is of itself a complete and perfect indemnity to him, provided he keeps back nothing which ought to be disclosed to the Court." Further on he says: "With respect to the other ground, that it is required for the

(1) 1 Dr. & Sm. 575. (2) 1 Dr. & Sm. 577.

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benefit of the lessor, it is true that in *Fletcher* v. *Stevenson* (1) Wigram V.-C. thought that although the decree of the Court would be a sufficient indemnity to the executor, it was right to set apart a sufficient part of the assets for the protection of the covenantee; meaning, of course, that the covenantee had that equity. Now if the covenantee had such an equity, it would necessarily follow that he could file a bill to enforce it. But in *King* v. *Malcott* (2) Turner V.-C. decided that there was no such equity, and dismissed a bill filed by the lessor to enforce it; and this seems to determine that the covenantee's right to protection is a ground that cannot be maintained." I find it difficult to resist the logic of the passage which I have just read, even if I wished to do so, and it appears to me that the truer ground, as far as I have been able to gather it from the authorities, is that of indemnity to the executors.

I should feel myself bound to follow an established practice, although there was no authority for it in the way of direct decision, or in the way of statutory enactment, but as matters stand there is no such practice established in a case like the present. Notwithstanding the industry of counsel, no case has been produced by which it can be shewn that assets have ever been retained unless in a case where there is privity of estate between the executors and the lessors. It is quite true that the real state of the facts in some of the authorities is not positively ascertainable. So far as appears none of the decisions relate to a case like the present where the executors have no privity of estate with the lessor. It is quite clear that, if the Court makes an order distributing this 65,800*l.*, the executors will be under no liability to the lessors should they hereafter be sued. It also, I think, may be taken as clear that there is no statute which requires any fund to be set apart for indemnity for the protection of the executors. In my opinion the authorities only shew that it is necessary to do so where there is privity of estate.

Then it is suggested (and I have not heard any good argument to the contrary) that the reason why, when there is privity of estate, something is set apart to protect the executors,

(1) 3 Hare, 360. (2) 9 Hare, 692.

is because the administration of the estate by the Court would not prevent an executor in possession of his testator's leaseholds from being sued as assignee under the lease. That does appear to be a ground for differentiating the one class of case from the other. To adopt a contrary view and to seek to indemnify the executors against possible future action on the part of the lessors, and to set apart such a sum as might be required for that purpose in an estate of this kind, would be, or might be, virtually, to lock up a very large fund for an indefinite number of years, really and truly only to preserve a fund in favour of persons who have no present claim. The lessors have not by virtue of their contracts between landlord and tenant bargained for any right to have property retained out of the testator's estate to answer future liabilities. I think, therefore, on the whole, that I am justified in saying that in a case like the present a fund ought not to be retained to the detriment of the beneficiaries under the will. I am bound to add that I think this is one of those cases in which the executors will be perfectly justified, if they see fit, although they would get protection under this order, in taking another opinion upon this question.

Solicitors: *Cooper & Bake; Cunliffes & Davenport.*

H. C. R.

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Feb. 10, 11.

In re DUNN.
BRINKLOW *v.* SINGLETON.

[1897 D. 1242.]

Receiver—Costs—Indemnity—Charges of Personal Fraud—Costs of defending Action—Benefit of Trust Estate.

Though a receiver while acting in the discharge of his duty is entitled to be indemnified against all loss, including the costs of actions brought against him as receiver, still the guiding principle laid down by *Walters* v. *Woodbridge*, (1878) 7 Ch. D. 504, is that the defence to the action was for the benefit of the trust estate.

Where an action had been brought against a receiver and administrator pendente lite charging him with personal fraud and misconduct while acting as administrator and receiver, but otherwise having no relation to the estate except so far that the acts complained of were acts done by him while acting as an officer of the Court:—

Held, that the receiver was not entitled to be indemnified against the costs incurred in successfully defending this action.

Courand v. *Hanmer*, (1846) 9 Beav. 3, and *Bristowe* v. *Needham*, (1847) 2 Ph. 190, distinguished.

On the further consideration of this action for the administration of the estate of the late Alexander Douglas Dunn, the defendant Singleton, who had been administrator pendente lite and also the receiver in the action, claimed to be indemnified against certain costs incurred by him in defending an action brought against him as receiver under the following circumstances.

In April, 1897, A. D. Dunn died, having appointed a Mrs. Addison and a solicitor named Hinks executrix and executor of his will. Litigation then ensued in the Probate Division respecting his will, and in May, 1897, an order was made appointing Singleton administrator pendente lite. In July following, this action was commenced by a creditor, in which the usual order for administration of Dunn's estate was made. In April, 1898, probate was granted to the executors named in the will, and, in May following, the present action was stayed as against Singleton, he being no longer the representative of the estate, and he was appointed receiver in the action and

manager of Dunn's estate. In July, 1899, an order was made in an action of *Day* v. *Singleton* [1897 D. 2298] directing damages to be paid out of Dunn's estate to the plaintiff Day. (1) In July, 1902, Singleton was discharged from being receiver, his accounts were passed, and his remuneration and costs were paid.

In December, 1902, an action of *Addison* v. *Singleton* [1902 A. 1838] was commenced by Mrs. Addison, as personal representative of Dunn and a beneficiary under his will, against Singleton and the representatives of Hinks, the other executor, who was dead, charging Singleton with having fraudulently conspired with Hinks to bring about unnecessary litigation, and charging Singleton with gross personal fraud and negligence in the management of Dunn's estate, both as administrator pendente lite and as receiver, and claiming 6000*l.* damages.

In February, 1903, a summons was taken out in this action on behalf of Singleton, asking that he might be at liberty to defend the action of *Addison* v. *Singleton*, upon which no order was made except that the plaintiff in this action was to give notice to Singleton of the further consideration coming on, and he was to be at liberty to appear at his own risk.

The action of *Addison* v. *Singleton* was eventually dismissed with costs without being heard, as the plaintiff did not support her action when it came on in due course for trial. These costs had not been paid, and were not likely to be paid, owing to Mrs. Addison's want of means, and Singleton now claimed to be indemnified in respect of these costs out of Dunn's estate, which was insolvent.

W. M. Cann, for the plaintiff.

Rowden, K.C., and *Stokes*, for Singleton. A receiver as an officer of the Court is entitled to full indemnity from the trust estate against the consequences of all acts done by him in the discharge of his duty. The fact that he has passed his final account and been discharged makes no difference to a receiver's right to be indemnified: *Levy* v. *Davis*. (2) Singleton was attacked for acts alleged to have been done by him as receiver

(1) See [1899] 2 Ch. 320. (2) [1900] W. N. 174.

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and administrator pendente lite, and the Court will protect its officer and allow him the costs he cannot recover from the plaintiff attacking him: *Courand* v. *Hanmer* (1); this right of indemnity is a first charge on the fund in court: *Morison* v. *Morison* (2), in priority to the creditors in this action. The fact that Singleton had not first obtained the sanction of the Court does not disentitle him to his costs, since the defence proved successful: *Bristowe* v. *Needham.* (3) A receiver is in a similar position to that of a trustee; the Court is very strict in dealing with trustees, but it is the duty of the Court to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust: *Walters* v. *Woodbridge.* (4) The receiver must be indemnified out of the fund in court before anything can be distributed, either for the plaintiff's costs or for dividends: *Batten* v. *Wedgwood Coal and Iron Co.* (5); *Strapp* v. *Bull, Sons & Co.* (6) Singleton is therefore entitled to be paid his costs already incurred in defending the action, and also to have something set aside to indemnify him against the costs of an appeal or any other proceedings to set aside the judgment. [Kerr on Receivers, 4th ed. pp. 211 to 213, was also referred to.]

Levett, K.C., and *W. A. Peck*, for Dunn's executors. Singleton is not entitled to any payment in respect of, or indemnity against, the costs of the action of *Addison* v. *Singleton.* A receiver is not entitled to be indemnified against the costs of any action that is brought against him; he is entitled to be repaid any costs or expenses incurred in defending the trust estate, or in carrying out the directions of the Court, or in the honest discharge of his duties as receiver. The guiding principle in all these cases, as can be gathered from *Walters* v. *Woodbridge* (4), is that the defence has been for the benefit of the trust estate. In the present case no benefit could result to the trust estate from the defence of the action: the damages claimed, had they been recovered, would have gone to increase Dunn's estate. The action was not brought against Singleton

(1) 9 Beav. 3.
(2) (1855) 7 D. M. & G. 214.
(3) 2 Ph. 190.
(4) 7 Ch. D. 504, 510.
(5) (1884) 28 Ch. D. 317.
(6) [1895] 2 Ch. 1.

as receiver, but for personal misconduct in the management of this estate, and was started on the footing that he had been guilty of fraud as administrator pendente lite a year before he was appointed receiver. *D'Oechsner* v. *Scott* (1) shews that a receiver has no charge upon the capital for his costs. These costs were not "an outlay in strict line of his duty" towards his cestuis que trust: *Hosegood* v. *Pedler* (2), which, except that it was the case of an executor, is very like the present case.

[BYRNE J. *Walters* v. *Woodbridge* (3) does not appear to have been cited in that case.]

Singleton is not entitled to defend his character at the expense of the trust estate unless the defence is also for the benefit of the trust estate.

P. Wheeler, for a creditor having liberty to attend, supported this argument.

Rowden, K.C., in reply. In *Hosegood* v. *Pedler* (2) the executor had distributed the assets, and the action was no longer one it was his duty to defend. A cestui que trust is bound to save his trustee harmless as to all damages relating to the trust: *Balsh* v. *Hyham* (4), and per Lord Lindley in *Hardoon* v. *Belilios* (5); and a receiver is in the same position. This right to indemnity against all costs and expenses properly incurred in the execution of the trust is a first charge on all the trust property: *Stott* v. *Milne*. (6) If Singleton had not been receiver, this action could not have been brought against him. *Walters* v. *Woodbridge* (3) does not lay it down as an invariable rule that the only test is the benefit of the trust estate.

Cur. adv. vult.

Feb. 11. BYRNE J., after referring to the nature of the question raised, which he characterised as one of some importance, and stating the circumstances under which it was raised, and observing with reference to the dismissal of the action of *Addison* v. *Singleton* with costs that it would be wrong under

(1) (1857) 24 Beav. 239.
(2) (1896) 66 L. J. (Q.B.) 18.
(3) 7 Ch. D. 504.
(4) (1728) 2 P. Wms. 453.
(5) [1901] A. C. 118, 124.
(6) (1884) 25 Ch. D. 710, 715.

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the circumstances to take it that a single word of the charges there made had any foundation in fact, and that it was only necessary to say that the action had been dismissed with costs, continued:—

Mr. Singleton says that under the well-known rule that a receiver, or an officer of the Court such as an administrator pendente lite, is entitled to full indemnity from the trust estate for his acts done in that capacity, he ought now to be indemnified against the costs he has been put to in the action of *Addison* v. *Singleton*, the plaintiff in that action being impecunious, and it not being disputed that there is no chance of recovering anything from her by way of costs. I do not want to state in a concise form exactly and precisely the limits and extent of the nature of the indemnity to which receivers, officers of the Court, and trustees are entitled. It has been treated throughout, and I think reasonably so, on the footing that the nature of the indemnity given in the case of trustees is similar to that given by the Court to its officers and receivers. A general statement of the rule is given in Kerr on Receivers. After speaking, on p. 211 of the last edition, of a receiver being entitled out of the fund to "his costs, charges, and expenses properly incurred in the discharge of his ordinary duties, or in extraordinary services which have been sanctioned by the Court," the author goes on in a subsequent passage, at p. 213, to say: "A receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expense he may have been put to in the performance of his duties, or in bringing actions, or defending legal proceedings which have been brought against him. Where, for example, an adverse application had been made against a receiver by a party to the cause, which was refused with costs, the applicant being wholly unable to pay those costs, it was held that the receiver was entitled to be indemnified, and have his costs as between solicitor and client out of the fund in hand, although it belonged to incumbrancers. So also where a receiver defended an action at law, and the defence was completely successful, the extra expenses were allowed, although the receiver had acted without the leave of the Court." Then other instances are referred

to. I think of all the authorities that have been referred to, the one most useful for trying to get at the principle to be applied is *Walters* v. *Woodbridge*. (1) The report in the Court below is in 20 W. R. 520. In that case there had been an action by trustees and executors to obtain the sanction of the Court to a certain agreement for the sale of the testator's share in a brewery business. That agreement was approved. "In December, 1868, the suit of *Woodbridge* v. *Teesdale* was instituted by the next friend of certain infant grandchildren of the testator against the trustees and executors of his will. The bill contained various charges of gross misconduct on the part of Teesdale, with respect to the sale of the testator's share in the brewery business, and it prayed that it might be declared that the decree in *Woodbridge* v. *Woodbridge* was obtained by fraud, alleging that sufficient information had not been brought before the Court as to the value of the share sold. Teesdale applied in chambers in the above suit of *Walters* v. *Woodbridge* (which was instituted in 1863 for the purpose of administering the testator's estate) for leave to defend *Woodbridge* v. *Teesdale*." That was ordered to stand over, and leave was never given. So that there is a remarkable similarity so far between what took place in that action and in this with regard to an application having been made in due time, but not being granted. Then Lord Romilly said: "A trustee may be allowed to institute or defend a suit at the cost of the estate, where the suit has reference to the estate. Where, for instance, a claim is made upon the estate, the Court allows the trustee his cost of resisting such claim, though his personal conduct is not called in question; but the Court will not allow a trustee his costs of defending a suit solely for the purpose of repelling charges of personal misconduct. I regret that the Court cannot assist the trustee in cases where the plaintiff or the next friend is a man of straw, and I wish that there was some rule of the Court by which plaintiffs and next friends under circumstances like these might be required to give security for costs." He held he had no power to grant the application and refused it. Then that came on to be heard

(1) 7 Ch. D. 504.

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before the Court of Appeal, and there some very valuable observations were made by Sir George Jessel as to the principle. He speaks of the circumstances, and then he says (1): "Then, as regards the merits, the suit of *Woodbridge* v. *Teesdale* was in substance a step towards impeaching a compromise which has been decided to be a compromise beneficial to the estate. It was in form a suit to impeach the decree sanctioning that compromise—a decree without which that compromise could not have been carried out, since it was requisite to bind persons under disability. A decree, therefore, setting aside the decree in *Woodbridge* v. *Woodbridge* would have gone a long way towards doing away with the compromise. It is true that the bill in *Woodbridge* v. *Teesdale* proceeds on the ground of personal fraud imputed to one of the trustees in obtaining the decree; but whatever the ground was on which the decree was impeached, the suit was defended by the trustee, not on his own behalf, but simply as trustee. It seems to me, therefore, to come within the principle that where an action is brought against a trustee in respect of the trust estate, whether it be an action of ejectment, trespass, or of any other description, and is defended by the trustee, not for his own benefit, but for the benefit of the trust estate, he is entitled to indemnity. Here the defence by the trustee was for the benefit of the trust estate; it is true that at the same time he defended his own character, but that was merely an incident. If he had died, and his co-trustees had defended the action, they must at the same time have defended him. The defence of his character, therefore, does not make the defence less a defence on behalf of the trust estate, and there is no reason why he should be left to bear his own costs." Then follows this passage, that was very much relied on by counsel for Mr. Singleton: "The principle that a trustee shall not make any profit from his office is rigidly enforced by the Court, and the principle that while he acts in the due discharge of his duty he is to be indemnified against all loss ought to be enforced with equal strictness." James L.J. was of the same opinion, and he said (2): "The Court is very strict in dealing with trustees, and it is the duty of the

(1) 7 Ch. D. 509. (2) 7 Ch. D. 510.

Court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust. Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts, and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have part of the costs." Thesiger L.J. agreed with the other learned judges. Now I gather from what was stated by the Court of Appeal in this case that the principle they acted upon was, that a trustee or receiver is not entitled to be indemnified against every action that may be brought charging fraud against him personally, but only in cases where it is part of his defence as trustee or receiver in an action brought in respect of the estate that he is also defending the estate. I do not understand the Court of Appeal there to have differed with Lord Romilly, had Lord Romilly's view been the correct view of the facts of the case, namely, that he ought to treat it as though it were a separate action brought against the trustee on the ground of personal fraud or misconduct.

Now when I come to consider what was the nature of the action brought in the present case, I cannot avoid seeing that it was an action the defence of which could not have resulted in any benefit to the trust estate. It is true that the charges brought against Mr. Singleton were charges brought against him for acts done while he was administrator pendente lite and while he was receiver; but the charges against him are charges of gross personal fraud, and however successful he might have been, as he was, in the defence of the action, that could result, and has resulted, in no benefit to the estate. Again I want to say that I am not laying down any general rule that it must be shewn to be for the benefit of the estate, although, as at present advised, I do not quite see how any action, the result of which could not be for the benefit of the

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estate, would be allowed to be defended at the expense of the estate.

I have dealt at some length with *Walters* v. *Woodbridge* (1), because it appears to me the most important case on the question; but I will refer to a few others to shew that I have not overlooked them. The first is *Courand* v. *Hanmer*. (2) In that case a clergyman created a number of incumbrances on his living. A bill was filed and a receiver was appointed, and then Hanmer presented a petition seeking to charge the receiver on account of various alleged neglects and defaults; but the Master of the Rolls dismissed it with costs. The argument is not given at length, but it is stated that Mr. Chandless was heard for an incumbrancer; and the Master of the Rolls said: "I have no doubt that the receiver must be indemnified, and have his costs as between solicitor and client out of the fund." That was a proceeding in an action, and with reference to accounts brought in by the receiver; and it appears to me it is analogous to a case where opposition has been made to a receiver by parties entitled to appear on passing his accounts seeking to disallow items in his accounts. In those circumstances I think it was natural that his costs should be allowed out of the estate as against the incumbrancers who took knowing that it would be subject to the proper costs to be incurred in an incumbrancer's suit, and the receiver was appointed as much for their benefit as for the benefit of the mortgagor. It appears to me, therefore, that that case is no authority for doing what is asked in the present case.

Another case referred to was *Bristowe* v. *Needham*. (3) There the receiver did not obtain the sanction of the Court. He defended an action brought against him by a party to the cause. What the nature of the action was I do not know. It appears to have been an action brought against him at law by the defendant, and he successfully defended it. It was probably an action that in the ordinary course would have affected the estate, had the result been different. The Lord Chancellor said though that circumstance (that is, that he made the

(1) 7 Ch. D. 504. (2) 9 Beav. 3.

(3) 2 Ph. 190, 191.

defence without the sanction of the Court) would have deprived the receiver of his right to reimbursement if he had failed in his defence, "yet, as he had succeeded without putting the estate to the expense of an application to the Court, which he might have made for his own security, there was no reason why he should not stand in the same position as to indemnity, as if he had made that application." The decision there only is that, by not applying to the Court for leave, the receiver is not deprived of that indemnity which, if he had applied for leave and obtained it, he would in a proper case have been entitled to.

The case of *Hosegood* v. *Pedler* (1) before Charles J. that was cited I will not refer to at length, because there the circumstances were very different from those of the present case; but there are certain observations in it with regard to the right to indemnity being a right of indemnity while the office is continuing, and in respect of acts done in the course of that office, which, so far as they have any bearing on the present case, are hostile to the claim on the part of Mr. Singleton.

I of course regret very much that Mr. Singleton should suffer by reason of the impecuniosity of the person who has brought an action of such a nature against him; but, without going into the illustrations that were put, it is perfectly obvious that a line must be drawn somewhere, and that a receiver cannot be entitled to indemnity in respect of the costs of an action brought against him, if it is a purely personal action against him and not having relation to the estate, except so far as the acts complained of were acts done by him while acting as an officer of the Court. I think, therefore, that the present application by the late receiver for costs incurred and for indemnity against these costs out of this estate must be refused.

Solicitors: *Stanley J. Attenborough; Pownall & Co.; Crawford & Chester; A. F. V. Wild; Roberts & Wrightson.*

(1) 66 L. J. (Q.B.) 18.

W. C. D.

FARWELL J.

1904

Jan. 29.

RIDOUT *v.* FOWLER.

[1903 R. 927.]

Vendor and Purchaser—Real Estate—Purchaser's Interest in Land—Judgment Creditor of Purchaser—Equitable Execution—Receiver—Notice to Vendor—Rescission of Contract on Money Payment to Purchaser—Secured Creditor—Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *s.* 13.

In June, 1901, the purchaser under a contract for the sale of land paid a deposit and was let into possession. The purchaser did not complete, and litigation ensued between him and the vendor. In August, 1902, a judgment creditor of the purchaser obtained by way of equitable execution an order appointing himself, upon giving security, receiver of the purchaser's interest in the land under the contract for sale, and at once gave notice of this order to the vendor, but did not perfect his security as receiver until May, 1903. In the meantime, in January, 1903, the purchaser being unable to complete, the litigation between him and the vendor was, without notice to the judgment creditor, compromised by the contract for sale being rescinded and the vendor paying the purchaser 110*l.*, not in part repayment of the deposit, but to give up possession of the property :—

Held, that under the circumstances the vendor was not a trustee for the purchaser of the land comprised in the contract, and that the purchaser's interest under the contract was not such an interest in land as that the receivership order operated as a charge upon it :

Held, also, that as the judgment creditor did not perfect his security as receiver until after the compromise, he had no claim against the vendor in respect of the 110*l.*

Semble, the result would have been the same even if the 110*l.* had been given in part repayment of the deposit.

On June 14, 1901, the defendant agreed to sell to one Green certain freehold premises known as Oakleigh Lodge, Sunbury, for 2850*l.*, the purchase to be completed on September 29 following ; and Green paid 300*l.* to the defendant as a deposit in part payment of the purchase-money, and was let into immediate possession of the premises.

On March 8, 1902, the defendant gave Green formal notice rescinding the agreement and forfeiting the deposit; and on May 29, 1902, Green commenced an action of *Green* v. *Fowler* [1902 G. 1084] against the defendant claiming return of the

deposit, to which the defendant counter-claimed for specific performance.

On July 1, 1902, the plaintiff Ridout, in an action in the King's Bench Division of *Ridout* v. *Green* [1901 R. 1925], recovered judgment against Green for 55*l.* and costs, and such costs were subsequently taxed at 100*l.* 7*s.*; and on August 8, 1902, Ridout was appointed receiver in his action of *Ridout* v. *Green* (upon first giving security in the usual way) to receive the rents, profits, and moneys receivable in respect of Green's interest in the premises Oakleigh Lodge, Sunbury.

On August 9, 1902, Ridout served Fowler with notice of his receivership order of August 8, 1902, and also duly registered it under the Land Charges Registration and Searches Act, 1888, and Land Charges Act, 1900.

On January 16, 1903, an order was made by consent in the action of *Green* v. *Fowler* [1902 G. 1084] by which the contract of June 14, 1901, was rescinded, and Green on payment to him of 110*l.* delivered up possession of the premises to Fowler. Ridout completed his security as receiver in May, 1903, and then commenced the present action against Fowler, and claimed a declaration that by virtue of the order of August 8, 1902, and under the circumstances he was entitled to a lien or charge upon the said premises for securing payment to him of the said sum of 155*l.* 7*s.*, and interest thereon at 4 per cent. per annum from July 1, 1902; and he also claimed payment by the defendant of said sum of 155*l.* 7*s.* and interest as aforesaid.

Bramwell Davis, K.C., and *T. K. Crossfield*, for the plaintiff. We admit that a receivership order does not operate as a charge on personalty: *In re Marquis of Anglesey* (1); but the rule is different as to real estate: *Ex parte Evans* (2); and from the date of his appointment as receiver the plaintiff had a charge on Green's interest in the property by virtue of s. 13 of the Act 1 & 2 Vict. c. 110. At that date the position under the contract was in substance this. Green was in possession of the property as equitable owner, and Fowler as vendor had

(1) [1903] 2 Ch. 727. (2) (1879) 13 Ch. D. 252.

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the legal estate and a lien or charge on the property for the balance of his purchase-money, and was to some extent a trustee of the property for Green. By the compromise Green in effect sold his interest in the land to Fowler for 110*l.*, and they carried out that arrangement by a rescission of the contract. They could not do that without the plaintiff's concurrence because they had notice of his charge. Further, although the receivership order did not operate as a charge on the 110*l.*, yet Fowler could not deal with Green and pay him that money without the plaintiff's consent: *In re Marquis of Anglesey* (1), and ought now to recoup the plaintiff.

W. F. Webster, for the defendant. A vendor is not a trustee for a purchaser until completion: *Shaw* v. *Foster* (2); *Rayner* v. *Preston*. (3) As to the compromise, there was no collusion. Green was impecunious and could not complete. The vendor wanted to get him out of possession and paid him the 110*l.*, not in part return of the deposit, but in consideration of his giving up possession. Further, a receiver of personal estate is not a secured creditor: *In re Potts* (4), and is not entitled to receive any money until he has perfected his security. Here the plaintiff did not complete his security until May 29, 1903, which was long after the compromise.

Bramwell Davis, K.C., in reply.

FARWELL J. The plaintiff in this case seeks to enforce a claim under his appointment of receiver by way of equitable execution which he obtained in an action in the King's Bench Division. The facts are these. [His Lordship then stated the facts, and continued:—]

Now the plaintiff in the present action claims against the vendor Fowler some lien or charge, first of all against the land, and, secondly, on the 110*l.* which was paid Green on the compromise of the action of *Green* v. *Fowler*. In my opinion both claims fail. As regards the land, it entirely depends on the nature of the interest which the purchaser Green acquired under the contract. A party who gets equit-

(1) [1903] 2 Ch. 727.
(2) (1872) L. R. 5 H. L. 321.
(3) (1881) 18 Ch. D. 1.
(4) [1893] 1 Q. B. 648.

able execution gets nothing more than his judgment debtor can give him. In *Ex parte Evans* (1) the Court of Appeal decided, and the decision binds me, that the appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional upon the receiver's giving security, operates as an immediate delivery of the land in execution; and when the security is afterwards given the order relates back to the date when it was made: so that the charge crystallizes at the date of the order. Now the rights of vendor and purchaser have been explained so often that it is sufficient to refer to what Lord Hatherley says in *Shaw* v. *Foster* (2), where, quoting from his own decision (3), he says: "'It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and cestui que trust does, in a certain sense, exist between vendor and purchaser: that is to say, when a man agrees to sell his estate he is trustee of the legal estate for the person who has purchased it, as soon as the contract is completed, but not before.' That was in reference to the actual conveyance. The expression used by Sir Thomas Plumer in *Wall* v. *Bright* (4), which has, I think, been just read by the noble and learned Lord who preceded me, is this: 'The vendor, therefore, is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey.'" James L.J. puts it perhaps more clearly in *Rayner* v. *Preston*. (5) He says: "I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is in fieri the relation of trustee and cestui que trust. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is in fieri. But when the contract is performed by actual conveyance, or performed in everything but the more formal act of sealing the engrossed deeds, then that completion relates back to the contract, and

(1) 13 Ch. D. 252.
(2) L. R. 5 H. L. 321, 356.
(3) (1870) L. R. 5 Ch. 610.
(4) (1820) 1 Jac. & W. 494, 503; 21 R. R. 219, 225.
(5) 18 Ch. D. 1, 13.

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it is thereby ascertained that the relation was throughout that of trustee and cestui que trust. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate." Now here it is quite clear that the relationship of trustee and cestui que trust never was created by the completion of the contract, and therefore there never was any estate in land in the events that have happened on which this order by way of equitable execution could have operated. That disposes of the question of any charge upon the real estate, because by reason of the events that have happened, and which the plaintiff in the present action could not interfere with or prevent, no actual estate in the land ever belonged to the debtor at all.

The next question is with respect to the 110*l*. It is rightly conceded that an order appointing a receiver by way of equitable execution creates no charge on personal estate. That is put very clearly by Lindley L.J. in the case of *In re Potts* (1), where he says: "The order not constituting a charge or lien, notice of it did not make it so." But in this case there is a fatal preliminary objection. When the compromise took place on January 16, 1903, there was no receiver appointed who was in a position to come and say, "Pay me the money"; and whatever may be the construction of the appointment of a receiver by way of equitable execution as applied to a charge on real estate, I am of opinion it is settled, as regards personalty, that when the order is in the form of appointing a receiver upon giving security, his appointment is not effectual till the security is given. It is a conditional appointment, and the giving of security is a condition precedent. The practice is to take the order to be drawn up, and the registrar then requires the parties to go before the master to settle the security. He does not pass or enter the order till he is satisfied by the production of the security, or by other proper evidence, that the security has been given, and then and then only does he pass and enter the order. And the receiver, unless he has completed his title, cannot claim payment of the money.

(1) [1893] 1 Q. B. 648, 661.

Here the title of the receiver was not complete, and he could not give a receipt or obtain the money. How therefore can any question arise as to the payment of the 110*l.*? It is admitted that there is no charge on the personal estate. That being so, I cannot see on what possible ground a person, who gives a notice in this way and does nothing more, can thereby create any charge in his own favour when, as Lindley L.J. says, there is no charge, and notice of it cannot make it a charge. That really disposes of the point. It was suggested, but I do not think the question really arises, that the 110*l.* was in fact part of the purchaser's deposit for which he had a lien on the property. For that purpose it is necessary to consider a purchaser's rights in respect of the deposit which he has paid. He has a right to a lien for the repayment of his deposit which, according to *Rose* v. *Watson* (1)—a case I recently followed in *Whitbread & Co.* v. *Watt* (2), affirmed by the Court of Appeal—attaches from the moment of payment conditional on this, that the purchase does not go off through his own fault. He has no absolute right to a charge for his lien or to any repayment of the deposit at all. It is only on his not being in default. If he is in default, his right does not exist. In the present case the purchaser was in default, and the order of compromise, which is after all the conclusive matter, shews on the face of it what the agreement was, and that no deposit was in fact returned; but the vendor, being in the unfortunate position of having on his hands a man who was unable or unwilling to pay a debt of 55*l.*, and seeing no chance of getting the balance of his purchase-money, gave him 110*l.* to give up possession of the property. I can only say it would be most unfortunate if a decision of this Court was to prevent an arrangement of this sort from being carried into effect when, as Mr. Webster pointed out, no offer has been made by the present plaintiff to step into the shoes of the defaulting purchaser and to pay the purchase-money and complete the contract. The truth is that a man in the position of the plaintiff cannot by merely giving a notice put a burden upon the party with whom he is dealing. The order operates no

(1) (1864) 10 H. L. C. 672. (2) [1901] 1 Ch. 911; [1902] 1 Ch. 835.

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doubt as an injunction against his own debtor to restrain that debtor from receiving the money, but it does not in any way affect the person who is going to pay the money under circumstances such as the present. The result is that the action fails, and must be dismissed with costs.

Solicitor for plaintiff: *A. Pope.*

Solicitors for defendant: *Smith, Fawdon & Low, for Bone, Bournemouth.*

H. L. F.

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MORTON *v.* BANK OF ENGLAND.

[1903 M. 3005.]

Poor Law—School District—Incorporated Board of Management—Dissolution of School District—Property of Dissolved District—Powers of last acting Managers—Transfer of Consols—Vesting Order—Poor Law Amendment Act, 1844 (7 & 8 *Vict. c.* 101), *ss.* 42, 43, 45—*Metropolitan Poor Amendment Act*, 1869 (32 & 33 *Vict. c.* 63), *s.* 1—*Dissolved Boards of Management and Guardians Act*, 1870 (33 & 34 *Vict. c.* 2), *ss.* 1, 12—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *s.* 22—*Local Government Board—Validity of Order—Form of Order.*

A school district formed under s. 40 of the Poor Law Amendment Act, 1844, and the board of management for that district formed under s. 42 of that Act, are distinct and separate entities, the latter being by s. 45 of the same Act constituted a corporation to hold the property of the district; and when the district is dissolved by virtue of an order of the Local Government Board made under s. 1 of the Metropolitan Poor Amendment Act, 1869, the corporation created by s. 45 of the Act of 1844 remains in existence.

In such a case the property of the district does not automatically vest in the last acting managers of the corporation by virtue of the words "shall be transferred to and vested in" in s. 12 of the Dissolved Boards, &c., Act, 1870, but must be transferred to them or to other parties, as the case may be, by a proper document, and the last acting managers or the survivors of them, as the last acting corporators, can for that purpose affix the seal of the corporation to the document.

Quære, whether the Local Government Board, when they have issued an order under s. 1 of the Act of 1869 dissolving and fixing a date for the dissolution of a school district, have power from time to time by subsequent orders to postpone the date of dissolution.

Quære also, whether, when an order is issued under s. 1 of the Act of 1869 dissolving a school district, the Local Government Board ought not, "prior to" issuing such order, make an order under the section for the

sale of the property of the managers of the district and the application of the proceeds.

Semble, when the Local Government Board make an order under s. 1 of the Dissolved Boards, &c., Act, 1870, extending the period for which the last acting managers of a dissolved district are to continue in office, the order should follow the words of the section, and should state the "special purpose" for which the last acting managers are to continue to act.

IN March, 1849, by an order of the Poor Law Board made under s. 40 of the Poor Law Amendment Act, 1844, certain unions and parishes were combined into a school district called the South Metropolitan School District; and under s. 42 of the same Act a board of management for the said school district was constituted. (1)

By subsequent orders made from time to time by the Poor Law Board, and their successors the Local Government Board, the limits of the said school district were altered; and by an order made on March 30, 1898, by the Local Government Board under s. 1 of the Metropolitan Poor Amendment Act, 1869 (2), the said school district was dissolved from and after

(1) The Poor Law Amendment Act, 1844, s. 40, empowers the Poor Law Commissioners to combine unions, or parishes not in union, or such parishes and unions, into school districts; and s. 41 empowers the Commissioners to form districts for providing asylums for houseless poor.

By s. 42, "A board shall be constituted for every district formed under this Act for the maintenance of a school or of an asylum; and every district board so constituted shall respectively consist of members to be elected from amongst the persons rated within the district to the relief of the poor. . . ."

Sects. 43 and 44 prescribe the powers and duties of district boards.

Sect. 45: "Every such district board shall be enabled to accept, take, and hold, on behalf of the district for which they act, any lands, buildings, goods, effects, or other property, as a corporation, and in all cases to sue and be sued as a corporation, by the name of the Board of Management of the District School or Asylum, as the case may be."

(2) The Metropolitan Poor Amendment Act, 1869, s. 1, empowers the Poor Law Board to dissolve any metropolitan asylum or school district, and upon such dissolution to adjust the rights and liabilities of parishes and unions comprised therein respectively; "and prior to issuing any order dissolving such district, the said board may by their order empower the managers of such district to sell and dispose of any land, buildings, or other property belonging to them, and to apply the produce thereof in discharge of the debts and liabilities then outstanding against such managers, and to distribute any surplus which may remain among the parishes or unions comprised therein according to their original proportions. . . ."

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September 30, 1898; and by subsequent orders made from time to time the date of dissolution of the said school district was from time to time deferred, and ultimately by an order made on March 21, 1902, the said school district was dissolved from and after September 29, 1902.

By an order made on October 27, 1898, by the Local Government Board the said board of management were directed to invest in Consols a sum of money then in the hands of their treasurer; and by the same order it was ordered and declared as follows: "And we declare that the said board of management shall stand possessed of the said stock when purchased upon trust to transfer and dispose of the same and the principal moneys thereby secured in such manner for the permanent advantage of the South Metropolitan School District as we by an order under our seal of office may direct."

All the debts and liabilities of the said board of management had been discharged, and at the date of the order next after stated there was standing in the books of the defendant bank (hereafter called the bank) in the name of "The South Metropolitan District School Board" a sum of 15,329*l.* 13*s.* 5*d.* Consols, which represented surplus assets of the said board of management.

By an order made on August 10, 1903, by the Local Government Board the plaintiffs, as the last acting managers of the said school district, were ordered to transfer the said Consols to several poor law guardians in the sums and proportions in the order mentioned. This order was expressed on the face of it to be made "in pursuance of the powers given to us by the statutes in that behalf"; and was in fact made chiefly in pursuance of the provisions of s. 1 of the Metropolitan Poor Amendment Act, 1869.

By an order made on September 22, 1903, by the Local Government Board it was ordered that the plaintiffs as the last acting managers "or the survivors of them shall be empowered to act in all matters lawfully entrusted to them for a further period not extending beyond December 25, 1903"; and by another order made on December 22, 1903, this period was again extended to June 24, 1904.

The bank declined to recognise the validity of the order of August 10, 1903, or the right of the plaintiffs to transfer the Consols, and thereupon the plaintiffs commenced this action in November, 1903, and claimed a declaration that they were entitled as joint tenants to the Consols, and were entitled to require the bank to transfer the Consols into their joint names; alternatively, a declaration that they were entitled, as the last acting managers of the said school district, to transfer the Consols into the names of the several sets of poor law guardians mentioned in the order of August 10, 1903.

The bank by their defence relied on s. 22 of the National Debt Act, 1870 (1), and alleged that, as the said Consols were standing in their books in the name of the "South Metropolitan School District Board," which became a corporation by virtue of s. 45 of the Poor Law Amendment Act, 1844, the said Consols could only be transferred under the seal of that corporation if it had not been dissolved; and, if it had been dissolved, then only by a vesting order made under the Trustee Act, 1893. The bank also alleged that the order of August 10, 1903, was ultra vires.

Bramwell Davis, *K.C.*, and *J. B. Matthews*, for the plaintiffs. The question in whom these Consols are now legally vested turns to a great extent on ss. 1 and 12 of the Dissolved Boards, &c., Act, 1870. (2) It is submitted that on the true construc-

(1) The National Debt Act, 1870, s. 22, enacts: "In the offices of the respective accountants-general of the banks of England and Ireland books shall continue to be kept wherein all transfers of stock shall be entered.

"Every such entry shall be conceived in proper words for the purpose of transfer, and shall be signed by the party making the transfer. . . .

"Except as otherwise provided by Act of Parliament, no other mode of transferring stock shall be good in law."

(2) The Dissolved Boards of Management and Guardians Act, 1870, after reciting "Whereas it is expedient that better provision should be made for the proceedings of boards of management and boards of guardians when the districts or unions for which they have acted respectively are dissolved," provides (s. 1) that when the Poor Law Board shall have dissolved or shall dissolve any district, "the persons who were acting as managers or guardians at the time of the dissolution . . . . and the survivors of them, shall continue in office for the purpose of paying and discharging the debts and liabilities of such district, union, or parish, and of receiving and recovering

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tion of the Poor Law Amendment Act, 1844, the school district and the board of management of the school district are interchangeable terms and mean the corporation created by s. 45 of that Act, which has been properly dissolved by s. 1 of the Metropolitan Poor Amendment Act, 1869; and that the property of the corporation, on its dissolution, by virtue of ss. 1 and 12 of the Dissolved Boards, &c., Act, 1870, automatically vested in the plaintiffs as joint tenants. If this is so, then it has been "otherwise provided by Act of Parliament" within the meaning of s. 22 of the National Debt Act, 1870, and the plaintiffs, as the stockholders within the meaning of that section, and s. 4 of the National Debt Act, 1892, are entitled to call for a transfer of the Consols to the persons named in the order of August 10, 1903. If the corporation is dissolved, and the Consols are not automatically vested in us by s. 12, they would probably vest in the Crown as bona vacantia. There is no authority directly in point. The nearest case to the present is the *Hyde Corporation* v. *Bank of England*. (1)

Upjohn, K.C., and *Howard Wright*, for the bank. The Consols are on the register of the bank in the name of the "South Metropolitan School District Board," the corporation created by s. 45 of the Act of 1844. That corporation is still existing, and on the true construction of the Acts and sections that have been cited the Consols have not passed to the plain-

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moneys or other property due to the said district, union, or parish, as the case may be, in like manner as the board of management or board of guardians could have done if no dissolution . . . . had taken place . . . . provided that no such managers or guardians shall be empowered to act in the manner aforesaid for a longer period than twelve months from the date of the dissolution . . . . unless the Poor Law Board by their order shall authorize them to continue to act for some special purpose."

Sect. 12: "Upon the dissolution of any district or union . . . . the real and personal estate vested in the managers or guardians of such district, union, or parish respectively, shall be transferred to and vested in the persons who were acting as managers or guardians respectively at the time of such dissolution . . . . to be held by them as joint tenants, according to the nature of such property, in trust for the parishes comprised in such district or union . . . . until the same shall be sold, let, or otherwise disposed of under the authority of s. 3 of the Union and Parish Property Act, 1835. . . ."

(1) (1882) 21 Ch. D. 176.

tiffs as the last acting managers. Sect. 1 of the Act of 1869 does not authorize the Local Government Board to dissolve the board of management, but only the district; and under s. 1 of the Dissolved Boards, &c., Act, 1870, the board are to continue in office to wind up the affairs of the district, and s. 12 of that Act does not operate as a vesting order. The words are, not "shall vest in," but "shall be transferred to and vested in," and indicate that something is to be done to transfer the property to the last acting managers. The Consols should be transferred under the seal of the corporation.

[FARWELL J. By whose authority is the seal of the corporation to be affixed?]

By the plaintiffs as the acting corporators at the date of the dissolution of the district: s. 1 of the Dissolved Boards, &c., Act, 1870. There is no difficulty as to this in the present case, because the plaintiffs were the acting managers at the date of the first order of dissolution in March, 1898. Further, it is submitted that the Local Government Board have no power under s. 1 of the Act of 1869 to postpone the date of dissolution from time to time, and ought "prior to" issuing the order of dissolution make an order directing the disposition of the property of the district. Also, the order of August 10, 1903, and the subsequent orders are ultra vires, because under s. 1 of the Dissolved Boards, &c., Act, 1870, the acting managers are only to continue in office for twelve months from the date of the dissolution. The orders are also wrong in form, because they should follow the words of the same section, and state the "special purpose" for which the managers are to continue in office.

Bramwell Davis, K.C., in reply.

FARWELL J. It is by no means easy to find one's way through the maze of these Acts of Parliament, but I have come to a clear conclusion upon the particular enactments before me. By the Poor Law Amendment Act, 1844, s. 40, the Poor Law Board are to form school districts; and by s. 42 a board of management is to be constituted for every district. Now those are obviously two different and distinct things. The

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district is one thing; the board of management for the district is another; and by s. 45 of the same Act every such district board is incorporated for the purpose of holding the property of the district and of suing and being sued. Then the Metropolitan Poor Amendment Act of 1869, s. 1, authorizes the Poor Law Board (now the Local Government Board) "as and when they shall see fit to dissolve any school district." Now that is obviously the school district and not the board of management, the incorporated entity. Then the Dissolved Boards of Management and Guardians Act, 1870, contains this preamble: "Whereas it is expedient that better provision should be made for the proceedings of boards of management and boards of guardians when the districts or unions for which they have acted respectively are dissolved"—that again clearly treats the board as existing after the dissolution of the district—and enacts (s. 1) that when the Poor Law Board shall have dissolved any district, the persons who were acting as managers at the time of the dissolution shall continue in office for the purpose of winding up the affairs of the district and paying its debts and receiving and recovering its property, with a proviso that, "No such managers or guardians shall be empowered to act in the manner aforesaid for a longer period than twelve months from the date of the dissolution or addition, unless the Poor Law Board by their order shall authorize them to continue to act for some special purpose"; and s. 12 of the same Act—the district being dissolved, but the corporate board remaining—provides that "upon the dissolution of any district . . . . the real and personal estate vested in the managers . . . . shall be transferred to and vested in the persons who were acting as managers . . . . at the time of such dissolution . . . . to be held by them as joint tenants . . . . in trust for the parishes comprised in such district." Now that obviously means that on the dissolution of the district it is to be split up into its various component parts, all of which would have some share in the property which had formerly been held by the corporate body in trust for the district. Then the provision is that the real and personal estate vested in the managers "shall be transferred to and vested in"

the acting managers of the district. The phrase is a little unfortunate, because it is not strictly accurate to say that the property is vested in the managers. It is vested in the board of management which has been incorporated; but inasmuch as there may be cases in which the managers are not incorporated—because this section extends to various other districts, asylums, and unions—I think the reasonable construction is that the property vested in the managers, whether it be vested in them as individuals or as a corporation, is to be "transferred to and vested in" the acting managers at the date of the dissolution. Now, in my opinion, that is not, as has been argued, an automatic vesting order, the phraseology of which is familiar, and the usual words of which are, "shall vest in"; the words are "shall be transferred to and vested in," and point to an act to be done for that purpose. That appears to me to be a simple and reasonable solution of the matter. It has been suggested that it is absurd to dissolve the district and leave this corporate body still existing. I do not see the absurdity. It is obvious that the property on the dissolution of the district must be vested in some one; and if both district and board are dissolved at one and the same moment, the title to the real estate in land would, I suppose, vest in the Crown, and the title to the Consols in the bank would also vest, I suppose, in the Crown, as bona vacantia. But be that as it may, the Legislature appears to me to have adopted a much more sensible and convenient course by keeping the corporate body in existence, either by implication under the 1st section of the Act of 1870 for so long a period as there remains anything to be done, or, according to the common law rule, so long as any one of the corporators remain alive. I should prefer the first alternative if it were necessary to decide the point. It is unnecessary on this particular occasion to determine to whom the property is to be transferred, because, on the face of the section, it is to be to the persons who were acting as managers at the date of the dissolution, and they are the present plaintiffs. Now the order of dissolution in this case was dated March 30, 1898, and directed the dissolution to take effect as from September 30, 1898. A question has been raised, which is one of very

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considerable importance, as to the power of the Local Government Board to undo that dissolution, and as it were to set up the board again and then to dissolve it again. It has been also suggested that the managers cannot be continued in office for a period of more than twelve months from the date of dissolution, and that the "special purpose" should be specified on the face of the order. It is unnecessary for me to determine these questions, and I express no opinion upon them, although I think they are worthy of the consideration of the advisers of the Local Government Board. I think it is sufficient for me to declare that the plaintiffs are not entitled to claim, as they do, that this property is vested in them under s. 12 of the Dissolved Boards, &c., Act, 1870, but that it is necessary for the transfer to be executed under the corporate seal of the board. When the transfer is presented to the Bank of England the bank will, no doubt, with their usual care, consider whether the persons to whom the transfer is proposed to be made are the right and proper persons. The action must be dismissed with costs.

Solicitor for plaintiffs: *B. Avery.*
Solicitors for the bank: *Freshfields.*

H. L. F.

ATTORNEY-GENERAL *v.* CORPORATION OF NOTTINGHAM.

FARWELL J.

1904

Feb. 10, 11, 12, 13, 15, 17.

[1903 A. 1685.]

Public Health—Nuisance—Smallpox Hospital—Quia Timet Action—Evidence—Admissibilty—Injunction refused.

The theory of the aerial convection or dissemination of the disease of smallpox has not received the unequivocal sanction of medical science; and the establishment of a smallpox hospital, properly conducted, is not of itself necessarily such a serious source of danger to persons resident, working, or passing by in its immediate vicinity—say, a radius of 50 feet—as to constitute a public or a private nuisance for which an injunction will lie in a quia timet action.

In such an action evidence is admissible to shew what has occurred in the neighbourhood of other smallpox hospitals carried on under similar conditions, per Cotton L.J. in *Hill* v. *Metropolitan Asylum District*, (1879) 42 L. T. 212; approved on appeal, (1882) 47 L. T. 29, per Lord Selborne, dissentiente Lord O'Hagan. *Sed quære*, whether the admission of such evidence is not wrong in principle as raising a number of side issues on which it is impossible for the Court to adjudicate without injury to absent parties.

THIS was a quia timet action to prevent the defendant corporation from using as a smallpox hospital a building that they had recently erected in the parish of Bulwell within the borough of Nottingham, on the ground that the hospital was both a public and a private nuisance. The plaintiffs were the Attorney-General at the relation of several owners and occupiers of land and collieries in the parish of Bestwood, and also the relators. The hospital premises were within half a mile of the Bestwood collieries and within a quarter of a mile of certain ironworks. They immediately adjoined the public road leading from Bulwell to Popplewick, the hospital being within 17 yards of the road, and the grounds being separated from it by a wooden fence 6 ft. 6 in. high; and the road was used by the public, and in particular by the workmen employed at the collieries. In addition, a considerable number of people either lived or worked within a short distance of the hospital premises. By reason of these facts the plaintiffs alleged that

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the maintenance and use of the hospital caused grave danger of the spread of infection, not only among the households of the relators and of the persons employed by them and by the collieries, but also among the inhabitants of the neighbourhood and persons passing along the highway; and they claimed an injunction accordingly. The defendants alleged that the site for the hospital was selected in 1903 after careful consideration; that as the defendants did not require a loan for the purposes of the hospital, no application to the Local Government Board was necessary, but care was taken in selecting the site and erecting the buildings and preparing the grounds round the building to comply with the conditions upon which the Local Government Board usually insist before sanctioning a loan; and that the hospital was absolutely necessary for the welfare of the city of Nottingham, and there was no other site which would be equally suitable. The hospital accommodated from thirty to forty patients, and no case of maladministration was raised by the plaintiffs. Expert evidence was given on both sides. The principal witnesses for the plaintiffs being Dr. Thresh, medical officer of health to the Essex County Council, Dr. Chalmers, medical officer of health for Glasgow, and Dr. McVail, an eminent Scotch physician; and for the defendants, Dr. Boobyer, medical officer of health for Nottingham, Dr. Hope, medical officer of health for Liverpool, and Dr. Reid, medical officer of health for the Staffordshire County Council. Their evidence is sufficiently noticed in the arguments and judgments.

Upjohn, K.C., and *A. Llewelyn Davies*, for the plaintiffs. We admit that in a quia timet action the plaintiffs must prove reasonable apprehension of serious danger: *Hill* v. *Metropolitan Asylum District* (1); *Rex* v. *Sutton* (2); *Rex* v. *Vantandillo* (3); *Rex* v. *Burnett* (4); *Reg.* v. *Lister* (5); *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (6); and evidence

(1) (1881) 6 App. Cas. 193.
(2) (1767) 4 Burr. 2116.
(3) (1815) 4 M. & S. 73; 16 R. R. 389.
(4) (1815) 4 M. & S. 272; 16 R. R. 468.
(5) (1857) 3 Jur. (N.S.) 570.
(6) (1882) 21 Ch. D. 750.

is admissible of what has happened in the neighbourhood of other smallpox hospitals carried on under the same conditions: *Hill* v. *Metropolitan Asylum District.* (1) We rely on this: that smallpox is a disease which is infectious beyond all others of its class, and infection is capable of dissemination by the air. Therefore, in selecting a site for a smallpox hospital, a populous neighbourhood and proximity to a public thoroughfare must be avoided. The existing site is not a case of necessity; there are other sites available in the district. Our medical testimony shews that a smallpox hospital, wherever situated, is a serious source of danger to all residents and others within a radius of a quarter of a mile, and that there is even risk of infection within a half-mile radius.

Asquith, K.C., Macmorran, K.C., and *R. J. Parker*, for the defendants. The plaintiffs have failed to shew that the hospital in its present site is necessarily a serious danger to residents or passers-by. The hospital was opened in August last and has since been continuously used. Every precaution has been taken, and there is no evidence that any person has been affected by contagion within the alleged radius. The site is the most suitable for the purpose, and it is not intended to enlarge the building. The expert evidence of the plaintiffs is addressed to the theory of aerial dissemination within the alleged radius, but the voice of medical science is not entirely at one with them. Our evidence shews that, in the present state of medical science, the existence of a smallpox hospital, properly managed, must not be accepted as necessarily a cause of infection to residents or passers-by in its immediate neighbourhood. As to the authorities, *Hill* v. *Metropolitan Asylum District* (2) was not a quia timet action, but the case of a proved nuisance by the finding of a jury. In *Fleet* v. *Metropolitan Asylum District* (3) an injunction was refused, and Bowen L.J. said: "With regard to the theory of aerial dissemination of disease the voice of science is still uncertain." In *Attorney-General* v. *Manchester Corporation* (4) and *Attorney-General* v.

(1) 42 L. T. 212; on appeal 47 L. T. 29.
(2) 6 App. Cas. 193.
(3) (1884) 1 Times L. R. 80; on appeal (1886) 2 Times L. R. 361.
(4) [1893] 2 Ch. 87.

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Guildford Hospital Board (1), both quia timet actions, an injunction was refused; and in *Harrop* v. *Ossett Corporation* (2) and *Attorney-General* v. *Rathmines and Pembroke Joint Hospital Board* (3) injunctions were not granted. *Bendelow* v. *Wortley Union* (4) is the only case in which an injunction has been granted, and there the medical referee, on whose report the Court acted, was evidently a believer in the theory of aerial convection.

Upjohn, K.C., in reply. We admit the burden of proof is on the plaintiffs, but they are not bound to prove that aerial dissemination of the disease is possible. They have only to shew a strong case of probability that the apprehended mischief will in fact ensue from the continued presence of the hospital: *Attorney-General* v. *Manchester Corporation* (5): this is proved by the evidence. As to the cases. In *Hill* v. *Metropolitan Asylum District* (6) an injunction was granted in the first instance; then the Divisional Court ordered a new trial, and this order was in effect affirmed by the Court of Appeal and the House of Lords (7); but the hospital was moved without a new trial being had. In *Fleet* v. *Metropolitan Asylum District* (8) the hospital had been established for years. In *Attorney-General* v. *Manchester Corporation* (5) the hospital was a temporary one, and the case was heard on an interlocutory application; and *Attorney-General* v. *Guildford Hospital Board* (1) was the case of a small cottage hospital.

Cur. adv. vult.

Feb. 17. FARWELL J. This is an action by the Attorney-General on the relation of several owners and occupiers of land and collieries in the parish of Bestwood, and by the same owners and occupiers as plaintiffs against the mayor and corporation of Nottingham to restrain them from using a

(1) (1895) 12 Times L. R. 54.
(2) (1898) 14 Times L. R. 308.
(3) An unreported decision of the Court of Appeal in Ireland; a short-hand note of the judgment was handed to his Lordship. Since reported [1904] 1 I. R. 161.
(4) (1887) 57 L. J. (Ch.) 762.
(5) [1893] 2 Ch. 87.
(6) (1879) 4 Q. B. D. 433.
(7) 42 L. T. 212; on appeal 47 L. T. 29.
(8) 1 Times L. R. 80; on appeal 2 Times L. R. 361.

building lately erected and for the last six months used as a smallpox hospital from so using it, on the ground that it is a nuisance, necessarily causing serious danger to the public health and causing special damage to the relator plaintiffs. No actual case of injury has arisen, and the action is quia timet. In order to succeed in such an action the plaintiffs must shew a strong case of probability that the apprehended mischief will in fact arise: *Attorney-General* v. *Manchester Corporation* (1); or, to quote FitzGibbon L.J. in *Attorney-General* v. *Rathmines and Pembroke Joint Hospital Board* (2), "to sustain the injunction the law requires proof by the plaintiffs of a well-founded apprehension of injury—proof of actual and real danger—a strong probability almost amounting to moral certainty that if the hospital be established it will be an actionable nuisance. A sentiment of danger and dislike, however natural and justified, certainty that the hospital will be disagreeable or inconvenient, proof that it will abridge a man's pleasure or make him anxious, the inability of the Court to say that no danger will arise, none of these accompanied by depreciation of property will discharge the burden of proof which rests on the plaintiffs, or justify a merely precautionary injunction restraining an owner's use of his own land upon the ground of apprehended nuisance to his neighbours." Further, the defendants are entitled in my opinion to ask the Court to assume that the hospital will be properly managed, and that all the precautions that scientific skill and knowledge usually require will be taken, and they are entitled in the present case to the benefit of the observation that the hospital has been open and has received patients for the last six months, during the last half of which it has been full, and that no mischief has at present arisen therefrom. The hospital stands on a piece of ground 4½ acres in extent, roughly triangular in shape, the base of the triangle being about 350 yards long and abutting on the high road. It is enclosed on all sides except one with a close wooden fence 6 ft. 6 in. high, with barbed wire on the top, and there is an inside fence of barbed wire 20 feet distant. The hospital building is 51 feet from the high road. On the

(1) [1893] 2 Ch. 87. (2) Unreported. Since reported [1904] 1 I. R. 161.

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side where there is no fence there is a stream nearly 20 feet wide with a steep bank 15 feet or 20 feet high sloping abruptly from the hospital grounds down to the river. There are 204 residents within a quarter-mile radius from the building, and 510 within the half-mile radius. There are 230 men employed on the Bestwood ironworks, part of which is within the quarter-mile radius, and 1280 on the colliery, which is without the quarter-mile radius, but within the half-mile radius; but the majority of the latter work underground, and some 45 men work at the bleach works outside the quarter-mile radius and within the half-mile radius. The hospital is some miles from the populous parts of Nottingham, and has access to the city by means of a road which has few houses on either side and is not much used for general traffic. The nearest residence is Barrow's cottage, with five inmates, 48 yards distant, and the next nearest are six cottages, with 23 inmates, 157 yards distant. The plaintiffs' allegation that the hospital is a nuisance rests on the establishment as a general affirmative of the proposition that all smallpox hospitals necessarily constitute a serious danger to the health of persons resident, working, or passing by within a radius of at any rate 51 feet. This is obviously a very serious question. Having regard to the impossibility of stamping out smallpox under the existing laws, and to the practical impossibility of isolating an outbreak in crowded areas, the Court ought not to come to any conclusion that would result in closing the majority of the smallpox hospitals in the kingdom unless the expert testimony is really conclusive. Now it is clear from the evidence that I have heard in this case that the medical profession are divided into two camps on this question, each containing persons of eminence and experience. The first point of difference is on the theory of aerial convection for any considerable distance —say, for more than 50 feet. This is a purely scientific question, and I gratefully adopt Bowen L.J.'s statement in *Fleet* v. *Metropolitan Asylum District* (1) that "it would be most dangerous to form an independent opinion on a scientific question from the smatterings of science that might be picked

(1) 2 Times L. R. 363.

up during the hearing of a case." The plaintiffs do not contend that there is a consensus of expert opinion on the point, and it is enough for me to say that it is therefore not proven, and that I am not competent to form an opinion of my own on the question. If the plaintiffs could have established aerial convection for the requisite distance, they would have had a strong case in that they would have shewn the reason why danger should exist; but, failing this, they are driven to the empirical opinions of the experts. This is, of course, a legitimate and usual mode of proof; and the Court in the case of a conflict of experts may either say that the onus is on the plaintiff and has not been discharged, or it may examine the facts and the reasoning given by the experts as the ground of their opinion; and, if and so far as that reasoning can be tested by ordinary rules independent of special scientific knowledge, I feel bound to test it and not to state simply that the conflict is such that the plaintiffs have not discharged the burden cast on them. I will take Dr. Thresh, who is the protagonist on the plaintiffs' side, as an example of the reasoning of the plaintiffs' witnesses. His opinion is based on his experience and knowledge of a large number of cases of smallpox and of several hospitals, and is a conclusion of logic, not of medical science. His train of reasoning seeks to extend an induction founded on cases observed by or known to him to all other cases; but the induction fails, for the conclusion that all hospitals are sources of danger does not necessarily follow from the premiss that some hospitals are such; or, in other words, his cases are not sufficiently exhaustive, and his reasoning is a mere instance of the method of agreement described by Bacon as inductio per enumerationem simplicem, ubi non reperitur instantia contradictoria. It is a mere ascription of the character of a general truth to all hospitals, because in all hospitals known to the witness the fact is found to exist. There is the further difficulty that the cases are complicated by so many varying circumstances that the application of the methods of agreement and difference is impracticable. If the case had rested on the plaintiffs' evidence alone, I should have had great

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difficulty in adopting the conclusions as sufficiently proved; but the Court is in possession of a number of other cases in which smallpox hospitals have been full during outbreaks of the disease, and no case has occurred within the quarter-mile radius which could not be accounted for by some means other than the hospital. Mr. Upjohn attempted to minimize the force of this evidence by criticizing some of the witnesses and suggesting that Dr. Reid's instances only were trustworthy and asking me to treat the plaintiffs' affirmative cases as outweighing these. But this is a fallacy. The plaintiffs' case depends on the inference to be drawn from an unbroken series of facts. The argument is: in all cases where A has occurred, B has followed, therefore A causes B. But the conclusion depends on the universality of the premiss, and a negative instance unexplained breaks the chain. The defendants' case does not, however, rest on Dr. Reid alone. It would serve no useful purpose for me to go through the evidence in detail, but with regard to the plaintiffs' historical instances, if I may so call them, they have already figured in former actions, and very recently in the Irish Court of Appeal in the *Rathmines Case* (1), and have never been accepted as sufficient. It is important to remember that the Compulsory Notification of Diseases Act came into force only in 1899, and that before that it must obviously have been far more difficult, if not impracticable, to obtain trustworthy and sufficient data from which to generalize; and, indeed, I may well adopt FitzGibbon L.J.'s comment in the *Rathmines Case* (1) on them: "Cases such as Fulham, Sheffield, Bradford, and Nottingham may be explained by reason of the character of a neighbourhood and their other circumstances." The defendants' evidence is very strong. It is not for them to prove the negative, but their instances—especially Dr. Reid, with his large experience in Staffordshire, Dr. Hope, with his three hospitals in Liverpool, and Dr. Boobyer in Nottingham—are amply sufficient to break the chain of the plaintiffs' affirmative cases, even if I were satisfied that they had proved them. There is of course some risk of infection wherever there is smallpox, owing partly to the folly of bystanders and

(1) Unreported. Since reported [1904] 1 I. R. 161.

of friends and relations of the patients, and partly to the human fallibility of doctors and attendants, however careful. But, in considering the question from the point of view of a public nuisance, one must bear in mind that it is necessary for the public safety that some provision should be made for isolation, that the difficulties in the way of isolating in the case of the poor living in one or two rooms or crowded together in a single cottage are very great, and that it is (as Dr. McVail puts it) a choice of evils. This consideration is mentioned by Chitty J. in *Attorney-General* v. *Manchester Corporation* (1): "The apprehended future danger in the present case is danger to the public health. Now, undoubtedly, there are many cases of public nuisance—by interference with an unquestionable right of the public, such, for instance, as the permanent obstruction of a highway—where the Court did decline at once to permit evidence to be given of any supposed public benefit arising from the wrongful act complained of, and would refuse to balance the good alleged to accrue to some portions of the public against the mischief to the public in general. But in the case where the health of the Queen's subjects in general is concerned, it may possibly be a question whether, if the evidence shews that the maintenance of a smallpox hospital is on the whole, balancing the good against the evil, more beneficial to the health of the public at large, or to that portion of the public that inhabits or frequents the neighbourhood, than the leaving of the persons suffering from the disease scattered in their own homes, some weight might not be properly allowed to this circumstance. If Lord Hardwicke is rightly reported in the case of Coldbath Fields Small-pox Hospital—*Baines* v. *Baker* (2)—he appears to have entertained some such question when he stated his opinion that the hospital was 'a charity like to prove of great advantage to mankind.'" And the same consideration applies, though perhaps not to the same extent, to the private nuisance alleged by the plaintiffs. If the fact of a public nuisance were established, it would of course be no answer to the private owners to say that the hospital must be placed

(1) [1893] 2 Ch. 92. (2) (1752) Amb. 158.

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somewhere (see per Lord Blackburn in *Hill* v. *Metropolitan Asylum District* (1)); but where the question is whether the nuisance in fact exists or not, all the circumstances must be taken into consideration; and, after all, the owners and occupiers of the adjacent lands have a far more effective prophylactic provided for them by medical science than any injunction of any Court. I respectfully agree with the following passage in FitzGibbon L.J.'s judgment in the *Rathmines Case* (2): "It seems probable that the dread of smallpox is to a great extent the result of tradition. That scourge of the eighteenth century retains its terrors for those who do not realize that it has been deprived of most of its dangers. Vaccination is not only a preventive, but it also modifies the disease. The evidence even of Dr. Thresh is that vaccination and revaccination at proper intervals confer practical immunity. In applying the maxim sic utere tuo ut alienum non laedas, the duty of reasonable precaution for one's own protection is not to be ignored. An isolation hospital reduces the risk for every inhabitant of the district. It is, in fact, a necessity, and though the individual must be protected the public advantage should not be forbidden unless the danger and injury to the individual are clearly proved." In the present case I find as the result of the evidence that the site of the defendants' hospital was carefully chosen, is in a proper situation, and constitutes no appreciable danger to the public health and no nuisance to the relator plaintiffs' property.

As I understand that this case is likely to go to the House of Lords, I desire to add an observation as to the evidence in the hope of obtaining some direction from a superior tribunal. Both parties concurred in asking me to accept evidence in chief of what had happened with other hospitals, and I acceded to the request in deference to the opinion expressed in *Hill* v. *Metropolitan Asylum District* (3), and also because the same evidence of the same cases (with the same result) appears to have been admitted in the other reported cases relating to smallpox hospitals. The result is that the case has taken

(1) 6 App. Cas. 207. (2) Unreported. Since reported [1904] 1 I. R. 161.
(3) 42 L. T. 212; on appeal 47 L. T. 29.

a week to try; and I venture to suggest that the admission of such evidence in chief is wrong in principle, as raising a number of side issues on which it is impossible for the Court to adjudicate without injury to absent parties—e.g., how can I rely on the case of the hospital ships as a proved fact in the present case without injustice to them? In *Hill* v. *Metropolitan Asylum District* (1), in the Court of Appeal, Pollock B. rejected the evidence as to the facts of the Stockwell and Homerton hospitals, and Bramwell L.J. said he was wrong in so doing, and Cotton L.J. agreed with him. (It is not easy to see how the point arose, as the plaintiffs who succeeded had tendered the rejected evidence.) If the assumption in Cotton L.J.'s judgment were correct in fact, the evidence would be valuable; he says (2): "They might have shewn what in fact was the effect in the neighbourhood of the only other hospitals under the same conditions." But now there are numbers of such hospitals, and their conditions are infinitely various, and the extent and value of such differences are exceedingly difficult to estimate. In the House of Lords Lord Selborne appears to agree with Cotton L.J.; Lord O'Hagan dissents for reasons with which I respectfully agree. He says (3): "Without proof as to the state and management of the other hospitals, so as to establish a substantive similarity, any inferences drawn from a comparison of their operation with that of the Hampstead Asylum might have been quite fallacious and deceptive. But even without regard to this, I am not quite satisfied that the evidence was admissible, whether such conditions were or were not fulfilled. It was not pertinent to the issue tried as to Hampstead only. No notice had been given, in the pleadings or otherwise, that it would be offered. It would have involved the jury in a multitude of collateral inquiries, calculated to confuse and embarrass them; and it might have been endlessly prolonged by an indefinite multiplication of objects of comparison." Lord Blackburn thought it unnecessary to decide the point. Lord Watson's opinion is stated at p. 35, and would certainly

(1) 42 L. T. 212; on appeal 47 L. T. 29.

(2) 42 L. T. 215.

(3) 47 L. T. 31.

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rule out all the history that I have heard in the present case. He draws a distinction between evidence having a direct relation to the principal question in dispute and evidence relating to collateral facts, which will, if established, tend to elucidate that question. To make the latter admissible the party tendering it must "satisfy the Court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute; and I am disposed to hold that he is also bound to satisfy the Court that the evidence which he is prepared to adduce will be reasonably conclusive, and will not raise a difficult and doubtful controversy of precisely the same kind as that which the jury have to determine." As Bowen L.J. has pointed out in the *Fleet Case* (1), it is no part of the functions of the Court to qualify itself as an expert in science. The Court acts on the opinion of experts whose qualifications can be tested by cross-examination, and weighs the evidence so given and tested. The result is that the action fails and is dismissed with costs.

Solicitors for plaintiffs: *Hind & Robinson.*

Solicitors for defendants: *Sharpe, Parker & Co., for E. C. Newey & Son, Birmingham.*

(1) 1 Times L. R. 80; on appeal 2 Times L. R. 361.

H. L. F.

CURL BROTHERS, LIMITED *v.* WEBSTER.

FARWELL J.

1904

Feb. 22.

[1903 C. 3336.]

Goodwill—Sale of Business—Soliciting old Customers.

The rule laid down in *Trego* v. *Hunt*, [1896] A. C. 7, that the vendor of the goodwill of a business may not solicit any person, who was a customer of the old business prior to the sale, to continue to deal with the vendor, or not to deal with the purchaser, applies to all such persons, and ought not to be limited so as to exclude persons who before solicitation have of their own accord become customers of the vendor.

At the date of the agreement hereinafter mentioned the defendant and three persons of the name of Curl were carrying on business in Norwich as wholesale drapers and warehousemen under the name of Curl Brothers. On May 17, 1899, the partners entered into an agreement with W. P. Nobbs, as trustee for a company about to be formed under the name of Curl Brothers, Limited, for the sale of their business to the company. The company was duly registered on May 18, 1899, and on July 4, 1899, the agreement was adopted and confirmed by the company. The sale was duly completed, and pursuant to a clause in the agreement the defendant acted as managing director of the company until January 3, 1903. He then ceased to be a director of the company, and shortly afterwards promoted, and caused to be incorporated, a company called the Norwich Warehouse Company, Limited, for the purpose of carrying on, and which from its formation did carry on, the business of wholesale drapers and warehousemen in Norwich and elsewhere in competition with the plaintiff company. The defendant was a director of and held a large number of shares in the Norwich Warehouse Company. The plaintiff company alleged that the defendant had personally and by letter solicited custom from persons who were customers of Curl Brothers before the date of the sale to the company and were at the time of soliciting customers of the plaintiff company. This action was brought to restrain the defendant from this solicitation. The Norwich Warehouse Company,

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Limited, were not made parties to the action. It was admitted at the trial, after the close of the plaintiffs' evidence, that the defendant had solicited custom from persons who had been customers of the firm and were at the time customers of the plaintiff company; but it was alleged that some of these persons had of their own accord and without solicitation become customers of the Norwich Warehouse Company, Limited, before the date at which the defendant solicited their custom.

The only question argued was whether the injunction against the defendant should be limited so as to permit his soliciting custom from persons in this position.

Eldon Bankes, K.C., and *R. J. Parker*, for the plaintiffs.

Upjohn, K.C., and *Jessel*, for the defendant. On the evidence before the Court we cannot contend that the plaintiffs are not entitled to an injunction. But the injunction should be limited so as not to prevent the defendant soliciting old customers of Curl Brothers who had of their own accord become customers of the new company before any solicitation was made. It is stated by Lord Herschell in *Trego* v. *Hunt* (1) that persons "who were former customers of the firm to which he" (the vendor) "belonged may of their own accord transfer their custom to him." That cannot be prevented, and when they have done so the obligation not to solicit them is at an end. If the injunction were not so limited, the vendor could not send a price-list to a person who had of his own accord become his customer, and if such a person came into his shop and asked for an article which on inspection he did not like, the vendor would be precluded from offering him another article. It is only the initial capture of the customer which the Court will restrain. If it went further the injunction could not be worked: *Leggott* v. *Barrett*. (2)

Eldon Bankes, K.C., in reply. It is impossible for the Court to lay down exact rules as to what a man who has broken his contract may be allowed to do under all circumstances. A person who continued to be the plaintiffs' customer

(1) [1896] A. C. 7, 20. (2) (1880) 15 Ch. D. 306.

might give a casual order to the defendant, but that would not give the defendant a right to solicit him. The defendant may not do anything which amounts to solicitation of any one who continues to be our customer. We cannot restrain the Norwich Warehouse Company, but the defendant ought to be restrained from using their travellers as his agents to solicit customers of the old firm.

FARWELL J. The only question on which I propose to express an opinion is the general question, Does the rule which prohibits the vendor of a business from soliciting customers apply when those customers, although remaining customers of the old firm, have, in fact, dealt with the new firm set up by the vendor, so that they have become also customers of that new firm? In my opinion it does. The test, to my mind, is whether they are properly to be called customers of the old firm, the goodwill of which has been bought by the purchaser. The principle which governs this class of cases is unfortunately so wide that it is difficult to apply by reason of its generality. I suppose it really is the old principle that a man cannot derogate from his own grant; but it is qualified by the fact that it is now well settled that it is competent for a man who has sold his business to set up a similar business next door the next day, and do the best he can, short of representing that he is still carrying on the old business, or soliciting the customers of the old business, to attract away all the business he has sold. I take the law as I find it; but, as Lord Davey puts it (1), the difficulty of doing complete justice ought not to prevent me from meting out such scanty measure of protection to the purchaser of a goodwill as the circumstances permit. It seems to me that this is the very smallest measure of protection that the purchaser is entitled to get; it is unfortunate that he cannot get more; but he is entitled on the authorities to say, "You have sold me this business, and you shall not actively solicit the customers who made that business, who formed the value of it, to leave me and come to you." That being the principle, it appears to

(1) *Trego* v. *Hunt*, [1896] A. C. 29.

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me it is really a matter of indifference whether a particular individual who is solicited has also of his own accord done business with the vendor. If a customer, as in the instance before me is the case with every witness, has remained throughout and still is a customer of the old firm, the mischief done by the solicitation is the same whether he has also dealt with the new firm of his own free will or not. What the purchaser is entitled to say is, "You shall not actively solicit your old customers, who became mine, to come to you, whether they have or have not of their own accord come to buy goods from your new firm." The customers of the old business remain such although they have also dealt with the vendor in his new business: the rule prohibits the solicitation of the customers of the old business; and such customers do not lose that character because they also deal with the new business. I think I should be wrong to limit the small amount of protection which the purchaser of a business can get by any such restriction as is suggested. The injunction will go without any qualification as against Mr. Webster and his agents. I cannot grant an injunction against the company, but the injunction against Mr. Webster must restrain him from directing or suggesting solicitation by travellers or other agents of the company.

Solicitors: *Sharpe, Parker & Co., for Stevens, Miller & Jones, Norwich; Christopher & Roney.*

J. R. B.

HURRELL *v.* LITTLEJOHN.

JOYCE J.

1903

Nov. 24, 25.

1904

Jan. 13, 14, 30.

[1902 H. 3296.]

Settled Land Act—Tenant for Life—Sale by—Best Price—Undervalue—Purchaser—"Dealing in Good Faith"—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *s.* 4, *sub-s.* 1; *ss.* 53, 54.

In the case of a sale by a tenant for life under the Settled Land Act, the mere fact that the purchaser has acquired the property at an undervalue is not, by itself, sufficient to invalidate the sale. If he has acted in good faith he is protected by s. 54 of the Settled Land Act, 1882, and he is not bound to inquire whether the tenant for life or the trustees have had the property valued.

The tenant for life of a freehold public-house, which was let to a firm of brewers at a rent of 63*l.* for a term of which there were twelve years to run, sold the property, subject to the lease, for 2000*l.* Immediately after the sale the purchaser contracted to resell the property for 3000*l.* to the brewers, to whom it had previously been offered for 2750*l.* but in vain. The remainderman brought an action to set the sale aside on the ground that the best price had not been obtained. There was no evidence that the purchaser had acted otherwise than in good faith:—

Held, that he was protected by s. 54 of the Settled Land Act, 1882.

TRIAL OF ACTION.

Richard Littlejohn by his will, dated May 27, 1873, devised to his trustees certain freehold property, known as the Coach and Horses public-house, at Bexley, in Kent, upon trust for his grandson, the defendant R. G. Littlejohn, during his life, and after his death for his children equally.

The testator died in 1873.

The defendant R. G. Littlejohn had seven children, the plaintiff, Rebecca Hurrell, and six others, who were infants.

In 1893 the defendant R. G. Littlejohn, as tenant for life, granted a lease of the property to Messrs. Beasley, a firm of brewers, for twenty-one years from December 25, 1892, at a yearly rent of 63*l.*

In 1902 the defendant R. G. Littlejohn, acting under his statutory power as tenant for life under the Settled Land Acts, sold the property, subject to the lease, for the sum of 2000*l.* to the defendant Wasmuth, who on the same day mortgaged it for 2000*l.* to the defendant Norfolk. This freehold reversion

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had previously been offered to Messrs. Beasley for 2750*l.*, but they neither accepted the offer nor made any counter-offer, and any negotiation for a sale to them by the tenant for life had come to an end.

The plaintiff alleged that the sale was at an undervalue, and she brought this action to set it aside on the ground that, inasmuch as the best price had not been obtained for the property, the transaction was not a valid exercise of the power of sale conferred by the Settled Land Act, 1882, on the defendant R. G. Littlejohn.

The defendants other than R. G. Littlejohn were the purchaser, Wasmuth, and Norfolk, his mortgagee, the trustees for the purposes of the Settled Land Acts, and the infant children of R. G. Littlejohn.

It appeared that immediately after the sale the defendant Wasmuth had obtained a contract from Messrs. Beasley, the brewers, to purchase the property from him for the sum of 3000*l.*, but they subsequently declined to complete unless the sale to the defendant Wasmuth was confirmed by the remaindermen. There was evidence that the purchasers were still willing to give 3000*l.* for the property if they could get a good title.

Originally the action was partly based on allegations of fraud, which, however, were withdrawn before the hearing, and the case was reduced to a claim against Wasmuth and his mortgagee to set aside the sale as being made at an inadequate price, and therefore as being invalid, having regard to the provisions of the Settled Land Act, 1882. (1)

(1) Sect. 4, sub-s. 1: "Every sale shall be made at the best price that can reasonably be obtained."

Sect. 53: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

Sect. 54: "On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act."

W. F. Hamilton, K.C., and *W. A. Peck*, for the plaintiff. It is clear that the best price has not been obtained for the property, and that the purchaser has not dealt in good faith with the tenant for life as required by s. 54 of the Act. It is not necessary to prove fraud. The sale being at a gross undervalue to the knowledge of the purchaser, it is a fraud on the power. Such an advance in the price on an immediate resale is of itself evidence of bad faith on the part of the purchaser, and he cannot rely on the protection of s. 54. The question of good faith was considered in *Chandler* v. *Bradley*. (1)

[They also referred to *Oliver* v. *Court* (2); *Stevens* v. *Austen*. (3)]

Badcock, K.C., and *G. Henderson*, for the defendants Wasmuth and Norfolk. There is no evidence of fraud in this case, and in the absence of fraud the sale cannot be set aside. The purchaser is entirely protected by s. 54. It may be that the tenant for life might be sued under s. 53 in a proper case; but unless there is bad faith on the part of the purchaser—and none is shewn here—he is absolutely protected. The mere fact that he has made a good bargain in a speculative class of property is not enough to invalidate the sale. There is conflicting expert evidence as to the value of the property, and it is not shewn that 2000*l.* was less than a fair market price for the property. The action fails both as against Wasmuth and his mortgagee, who, at any rate, was a purchaser for value without notice.

Younger, K.C., and *C. Herbert Brown*, for the defendant Littlejohn.

Hughes, K.C., and *Church*, for the trustees.

Lyttelton Chubb, for the infants.

Cur. adv. vult.

1904. Jan. 30. JOYCE J. This is an action by one of a number of persons beneficially entitled in remainder to set aside a sale by a tenant for life under the powers of the Settled Land Act, 1882. The several defendants are the tenant for life, the purchaser, the trustees for the purposes of the Settled

(1) [1897] 1 Ch. 315. (2) (1820) 8 Price, 127; 22 R. R. 720.
(3) (1861) 3 E. & E. 685.

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Land Act, and the other persons interested in remainder with the plaintiff. At first there were extensive allegations of fraud, made, I think, under a misapprehension of certain facts and figures which have subsequently been explained. The charges of fraud having been withdrawn, the action is reduced to a claim against the purchaser and his mortgagee, Norfolk, to set aside the sale as being made at an inadequate price; in fact, I may say that practically the question I have to decide is whether a purchaser who buys from a tenant for life at less than the market price—or I should rather say who succeeds in getting a good bargain—can insist upon retaining it against the beneficiaries, having regard to the provisions of the Settled Land Act. [His Lordship read the material sections, and continued:—]

As to Mr. Norfolk, who is the mortgagee of the purchaser, he must, I think, upon the facts proved or admitted, be taken to have been, quoad his mortgage, a purchaser for value without notice, and there is no case for relief against him. Whether he ought to have been made a party at all I doubt, but as against him the action must be dismissed.

The principal defendant is the purchaser, Wasmuth. He is a director of a brewery company or firm, and has been all his life associated with a firm of distillers, to whom he described himself as being advising expert. He thus naturally has had considerable experience with respect to what is called licensed property. One Stapylton, formerly occupier of the Station Hotel, Sidcup, who had had business relations with Mr. Wasmuth or his firm, mentioned to him that he knew of a public-house for sale. He did not at first give the name or any particulars. Later, he came to Mr. Wasmuth and stated that the public-house in question was the Coach and Horses, Old Bexley, and gave the name of the solicitors, Messrs. Barton & Pearman, who had the business in hand as solicitors of the tenant for life. This public-house Mr. Wasmuth knew very well, for his firm were in the habit of supplying the spirits there consumed. Stapylton was then told to get the particulars, and, after some bargaining and negotiation with the solicitors, Mr. Wasmuth ultimately obtained a contract dated February 22, 1902, with the tenant for life for the purchase

of the property at the price of 2000*l.*, with a further sum, not to exceed 50*l.*, for the payment of the vendor's solicitors' costs. What I have called "the property" was the freehold subject to a lease which had still nearly twelve years to run. The lease was made in August, 1893, by the same tenant for life to Messrs. Beasley, the brewers, for twenty-one years from Christmas, 1892, at a rent of 63*l.* The rent paid by the occupying tenant to the brewers, subject to the usual tie, was 60*l.* per annum. The price agreed to be given by Wasmuth was thus about thirty-two and a half years' purchase. I see no reason to suppose that the property had materially increased in value since the lease in 1893; but, of course, public-house property is, or was, notoriously of a speculative character.

Now the purchaser certainly thought that he had made an advantageous bargain. Indeed, he bought as a speculation, and, of course, he would not have bought at all unless he had hoped and expected to make a profit. He swears, and I believe him, for I see no reason whatsoever to question his veracity as a witness, that he did not expect to make nearly so much as 1000*l.*—that is, 1000*l.* profit. Stapylton was an old schoolfellow of and on friendly terms with a member of the firm of Barton & Pearman, and, having been in the trade, he was requested by them, in the month of November, 1901, to make some inquiry with a view to ascertain what were the monthly takings of the public-house, the sale of which was then contemplated. He appears to have done so; but on November 20, 1901, he wrote a letter of that date to Messrs. Barton & Pearman, in which he stated that if they could get anything like 1800*l.* for their client they would not be doing any harm. After the contract Wasmuth promised to give Stapylton, who had introduced the matter to him, one-half of any profits that he, Wasmuth, might make out of the transaction. At one time it was rather suggested, though never distinctly contended, that the sale was invalid by reason of Stapylton's connection with the matter; but, as I say, this was not seriously contended, and I am satisfied that there is no ground for such a contention. Stapylton was never the agent of the vendor or his solicitors to find a purchaser or in any fiduciary

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relation to them. To my mind, it was quite natural that Wasmuth should be disposed to deal generously with him under the circumstances, and I think he was fairly entitled to something in the nature of a commission from Wasmuth.

Wasmuth, before purchasing, made no inquiry as to whether the trustees or the tenant for life had any valuation made, or anything of the kind. In my opinion, he was not bound to make any such inquiry any more than he was bound to inquire whether notice had been given to the trustees: as to which see Settled Land Act, 1882, s. 45, sub-s. 3.

Now, pausing here to consider the position on February 22, 1902, the date of the execution of Wasmuth's contract, I cannot find in the circumstances of the case any ground for concluding that Wasmuth in any way dealt with the tenant for life, or his solicitors, otherwise than in good faith. Consequently s. 54 of the Settled Land Act appears to me to apply. Now I do not mean to say that in an action for setting aside a sale under this Act the fact of the price being inadequate (whatever that may mean) may not, together with other circumstances, be material; but what I do think is this—that the mere fact that the purchase is at an undervalue of itself without anything more at all is insufficient to invalidate the sale if the purchaser acted in good faith. If I am right in this there is an end of the plaintiff's case as against Wasmuth, and I think there is no case as against him. As already intimated, no charge is made or relief sought against the tenant for life, or any of the other defendants except Norfolk. It appears that Wasmuth, within a few days after his contract with the tenant for life, offered the property to Messrs. Beasley, the brewers, for 3000*l.*, which offer they, somewhat to his surprise, accepted, and entered into a verbal contract to purchase from him for 3000*l.* This has not been carried out, but rescinded by reason of Messrs. Beasley insisting that the beneficiaries should concur for the purpose of confirming the sale. Messrs. Beasley no doubt were annoyed at finding that Wasmuth had purchased without their being aware of what was going on. They in fact communicated with some of the beneficiaries, and hence this action. The facts are, however, that Messrs. Beasley, as early as October, 1901, were in corre-

spondence with the solicitors of the tenant for life in reference to a renewal of the lease, and in effect these solicitors practically offered to sell the freehold to them for 2750*l.* Instead of accepting this offer or making any counter-offer, they wrote in such a manner that any negotiation for the sale of the property to them was considered to be at an end.

There was no actual valuation before the sale; but Mr. Lucas, one of the trustees, who was himself a competent surveyor and valuer, though without any special experience in reference to valuing public-houses, knew the property well, and considered that Wasmuth's offer of 2000*l.* ought to be accepted if there was to be a sale; and the tenant for life had long been desirous of selling with a view, no doubt, to investing the proceeds upon securities that would produce a larger income.

As to what the value of the property really was there is a conflict of evidence; but I am not at all satisfied with the estimates of value put forward on behalf of the plaintiff. I think they are fallacious, having regard to the fact that it was not a sale of the freehold in possession, but subject to a lease. Without the licence I do not think the property was worth more than 40*l.* a year to rent, if so much. What the value of the licence may be at the end of twelve years when the lease expires cannot, in my opinion, be predicted with anything like certainty. It is true that there is evidence that Messrs. Beasley are still willing to give 3000*l.* if they can get a good title. This does not, under the circumstances, satisfy me that the property was or is really worth in the market anything like 3000*l.*, especially as Messrs. Beasley would have nothing to say to the offer originally made to them by the solicitors of the tenant for life to sell for 2750*l.*

Upon the whole, as I have said already, I think the 54th section of the Settled Land Act furnishes the purchaser with a good defence to this action, which consequently, in my opinion, fails altogether.

Solicitors: *Heath & Hamilton; Benwell & Norfolk; Barton & Pearman; H. S. Knight Gregson; Leesmith & Munby.*

G. A. S.

JOYCE J.

1904

Jan. 19, 20, 21, 22; *Feb.* 1.

CHRISTY *v.* TIPPER.

[1903 C. 1015.]

Trade-mark—Registration—Invented Word—"Absorbine"—Patents, Designs, and Trade Marks Acts, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *and* 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 1.

The word "Absorbine," as applied to a veterinary preparation for absorbing and removing swellings, is not an "invented word" capable of registration as a trade-mark.

ACTION AND MOTION.

This was an action for an injunction to restrain the defendants from infringing the plaintiffs' registered trade-mark "Absorbine," and from passing off their goods as and for those of the plaintiffs.

The defendants denied the allegation of passing off their goods for those of the plaintiffs, and alleged that the registration of the word "Absorbine" as a trade-mark was improper; and they moved to have the mark expunged from the register.

The plaintiffs Christy & Co. were the agents in this country for the preparations of the plaintiff Young, who carried on business in America. The defendants were manufacturers of horse and cattle medicines, carrying on business in the United Kingdom and abroad.

The action and the motion came on for hearing together.

Having regard to admissions made by the plaintiffs during the trial, the only question for the decision of the Court was whether the word "Absorbine" was an "invented word" capable of being properly registered under s. 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by s. 10 of the Patents, Designs, and Trade Marks Act, 1888. That section provides that for the purposes of the Act "a trade-mark must consist of or contain at least one of the following essential particulars . . . . (*d*) an invented word . . . . ; or (*e*) a word or words having no reference to the character or quality of the goods . . . ."

The facts as to the registration of the mark are stated in the judgment of the Court.

Younger, K.C., and *E. P. Hewitt*, for the defendants, on the motion to expunge. The plaintiffs' mark was improperly registered. It could only be registered, if at all, as an "invented word" under s. 64, sub-s. 1 (*d*), of the Act of 1883. We submit that it is not an "invented word" within that section. It is the ordinary English word "absorb" with the addition of a meaningless termination.

Since the decision of the House of Lords in *Eastman Photographic Materials Co.* v. *Comptroller-General* (1) an invented word may be registered though it may have reference to the character or quality of the goods within clause (*e*). Prior to that case such a word as "Absorbine" would not have got upon the register. But since that decision some such words have been registered—in this case, we submit, wrongly.

Hughes, K.C., and *Sebastian*, for the plaintiffs. "Absorbine" is a perfectly good trade-mark, and properly on the register as an invented word: *Eastman Photographic Materials Co.* v. *Comptroller-General.* (1) A word may be said to be an invented word if it was not previously found in the language. Of course, a mere alteration in spelling is not enough. In *J. C. & J. Field, Ld.* v. *Wagel Syndicate* (2) "Savonol" was held to be an invented word. The termination "ine" has no more known meaning than the termination "ol." In *In re Linotype Company's Trade-mark* (3) it was held that an "invented word" need not be absolutely new or invented for the purpose. In that case the word "Tachytype" was allowed to be registered.

The quantum of invention is immaterial: per Lord Herschell in *Eastman Photographic Materials Co.* v. *Comptroller-General.* (4)

[They also referred to *In re Ripley & Son's Application* (5) and *Paine & Co.* v. *Daniells & Sons' Breweries.* (6)]

(1) [1898] A. C. 571.
(2) (1900) 17 Rep. Pat. Cas. 266.
(3) [1900] 2 Ch. 238.
(4) [1898] A. C. 581.
(5) (1898) 15 Rep. Pat. Cas. 151.
(6) [1893] 2 Ch. 567.

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Younger, K.C., in reply. The question is whether a word formed simply by adding the termination "ine" to a known descriptive word can be said to be capable of registration as an invented word. In *In re Meyerstein's Trade-mark* (1) Kay J. held that "Satinine" could not be an invented word; and that was not dissented from in *Eastman Photographic Materials Co.* v. *Comptroller-General.* (2) In *In re Sir Titus Salt, Sons & Co.'s Application* (3) "Eboline" was held not to be an invented word; and in *In re Farbenfabriken Application* (4) registration was refused in respect of the word "Somatose."

The employment of a word in ordinary and common use, with a diminutive or short and meaningless syllable added to it, is not enough to produce an "invented word": see per Lord Shand. (5) In *J. C. & J. Field, Ld.* v. *Wagel Syndicate* (6) Buckley J. took the view that Lord Herschell in the *Solio Case* (2) was of opinion that "Satinine" was not an invented word. If "Absorbine" may be registered, then "Nourishine" would be admissible with respect to stout, although "nourishing" would be disallowed. "Electrozone" is not an invented word: *In re British Electrozone Co.* (7)

R. J. Parker, for the comptroller.

Cur. adv. vult.

Feb. 1. JOYCE J. In November, 1901, the plaintiff, W. F. Young, applied for and subsequently obtained the registration as a trade-mark of the word "Absorbine" in class 2, "In respect of chemical substances used for agricultural, horticultural, veterinary or sanitary purposes," and in class 3, "In respect of chemical substances prepared for use in medicine and pharmacy." The user of the word seems to have been solely in connection with and as the designation of a liquid preparation professing to be "Especially prepared to absorb and remove the wind-puff, capped hock, thorough-pin, shoeboil, enlarged glands, soft splint, big knee, thick cord, knotted tendons, big

(1) (1890) 43 Ch. D. 604.
(2) [1898] A. C. 571.
(3) [1894] 3 Ch. 166.
(4) [1894] 1 Ch. 645.
(5) [1898] A. C. 585.
(6) 17 Rep. Pat. Cas. 271.
(7) (1896) 13 Rep. Pat. Cas. 447.

ankle, collar-puffs, boils and tumors." The defendants are well-known manufacturers and vendors of veterinary preparations, and they had previously sold an ointment under the name of "Tipper's Absorbent Ointment" for application in cases similar to those for which the plaintiffs' liquid remedy was advertised to be specially prepared or appropriate. At a date practically contemporaneous with the plaintiffs' application for their trade-mark "Absorbine," the defendants, who are in my opinion beyond all question perfectly honest and honourable traders, without any knowledge of what the plaintiffs were doing, changed the title of their absorbent ointment to "Absorbine," and they have sold the same under the title of "Absorbine Tippers" ever since, though perhaps not in very large quantities. The plaintiffs having discovered what the defendants were doing, on March 30, 1903, instituted an action, not only for the usual relief in respect of the trade-mark, but also for an injunction against passing off, or enabling others to pass off, their veterinary preparation, namely, an ointment as and for the plaintiffs' liquid remedy. The defendants replied with a motion to expunge "Absorbine" from the register. At the conclusion of the trial, if not before, it was virtually admitted on the part of the plaintiffs, and it was my opinion, that the only ground for the passing-off action was the use of the word "Absorbine," and I intimated my opinion, and if necessary I now decide, that if "Absorbine" be allowed to remain on the register of trade-marks the action for passing off as distinguished from the action in respect of infringement of trade-mark was unnecessary.

Now it is quite clear that the word "Absorbine" has obvious reference to the character or quality of the goods. It could only be registered, if at all, under clause (*d*) of sub-s. 1 of s. 64 of the Act of 1883, as being an "invented word." Whether it be so or not within the meaning of this term "invented word" in the statute is the single question that remains for me to decide. The first two syllables of the word under consideration are beyond all question the common English word "absorb." I do not think I have been told how the whole word was invented. In the application for its registration in America it is spoken of

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by the applicant as an arbitrary or arbitrarily chosen word. It may simply be a misspelling of the present participle of the verb "absorb," or it may represent that participle pronounced in a careless, slovenly fashion—I may almost say as frequently pronounced by ordinary people. If it be this, it is certainly incapable of registration in respect of such a veterinary medicament as the plaintiffs'. Or it may be the common English word "absorb" with a common termination added thereto. Such a termination is found in very many words designating a chemical substance, as may be seen by reference to the index to any manual of chemistry. For instance, chlorine, glycerine, pepsine, saccharine, &c. It is also found frequently as a mere termination in the names of medicinal and other preparations which are sometimes referred to as proprietary articles, as, for instance, Maltine, Phosphorine, Sulpholine, Brilliantine, &c. When so used I am not aware that the syllable "ine" has any meaning at all of itself, nor has it any here. It is little if anything more than a sort of flourish to round off the word or expression to which it is attached in order to make a euphonious name. In *Eastman Photographic Materials Co.* v. *Comptroller-General* (1) it was decided, contrary to what had previously been held, that a word might be a good invented word although it might have some reference to the character or quality of the goods, and that the word "Solio" was an invented word. The present Lord Chancellor, in the course of his observations, said (2): "My Lords, I desire to give my opinion with reference to the particular word, and not to go behind it. I can quite understand suggesting other words—compound words, or foreign words, as to which it would be impossible to say that they were invented words, although perhaps never seen before, or that they did not indicate the character or quality of the goods, although as words of the English tongue, they had never been seen before. Suppose a person were to attempt to register as a single English word 'Cheapandgood,' or even without taking so gross an example, using a word so slightly differing from an ordinary and recognised word as to be neither an invented word nor, avoiding the prohibited choice of a word, indicating

(1) [1898] A. C. 571. (2) [1898] A. C. 577.

character or quality. The line must be sometimes difficult to draw; but to my mind the substance of the enactment is intelligible enough, and the comptroller has to make up his mind whether in substance there has been an infringement of the rule. Of course also words which are merely misspelt, but which are nevertheless, in sound, ordinary English words, and the use of which may tend to deceive, ought not to be permitted." Lord Herschell, a very high, if not the highest, authority on the law of trade-marks, says (1): "It may, no doubt, sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before; nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form." And Lord Shand says (2): "At the same time, I agree with your Lordships, and particularly with what has been said by my noble and learned friend Lord Macnaghten, in thinking, especially after the decision to be given in this case, that the Comptroller-General will be fully warranted in taking care that there shall not be admitted, under the guise or cover of words called 'invented' by the applicant, words really in ordinary use, which might, in a disguised form, have reference to the character or quality of the goods. There must be invention, and not the appearance of invention only. It is not possible to define the extent of invention required; but the words, I think, should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word; and a word would not be 'invented' which, with some trifling addition or very trifling variation, still leaves the word one which is well known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word." Now, it is quite immaterial whether I agree with the opinions expressed

(1) [1898] A. C. 581. (2) [1898] A. C. 584.

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by their Lordships in that case or not; but indeed I do agree, and I know of no authority which requires me to hold that such a word as "Absorbine" is an invented word. None of the syllables or parts of which the word is composed was invented, and I see no invention in the combining of them so as to form the whole. The case of *In re Linotype Co.'s Trade-mark* (1), and I think also the case of *J. C. & J. Field, Ld.* v. *Wagel Syndicate* (2), were materially different from the present; and in the circumstances I find myself compelled to hold that "Absorbine" is not an "invented" word within the meaning of that expression in the Act, and must be expunged from the register. The action will be dismissed with the usual consequences.

Solicitors: *L. E. Townroe; Belfrage & Co., for T. W. Robinson, Birmingham; Solicitor to the Board of Trade.*

G. A. S.

JOYCE J. 1904 *Feb.* 6.

ASHWORTH *v.* ENGLISH CARD CLOTHING COMPANY, LIMITED (No. 1).

[1899 A. 1180.]

Costs—Taxation—Inspection of Property, the Subject of Action—No Order—Taxing Master's Discretion—Rules of the Supreme Court, 1883, *Order* L., *r.* 3.

The costs of an inspection of property being the subject of an action will not be disallowed merely because the inspection has been arranged between the solicitors of the parties, without an order for it having been obtained under Order L., r. 3.

ADJOURNED SUMMONS.

The action was for infringement of the plaintiff's patent. It was dismissed on the ground that the patent was invalid for want of subject-matter, and that no infringement had been proved. In taxing the defendants' costs the taxing master disallowed fees to counsel and an expert for inspecting certain machinery, the inspection having been arranged by agreement

(1) [1900] 2 Ch. 238. (2) 17 Rep. Pat. Cas. 266.

between the solicitors for the plaintiff and the defendants to avoid the expense of obtaining an order for the purpose.'

The taxing master, in his answer to the defendants' objection to the taxation, said that having regard to the nature of the action the inspection was in itself reasonable and proper, but he submitted that in the absence of agreement between the parties he could not properly allow the costs of the inspection of property, the subject-matter of an action, against the unsuccessful party, unless an order had been obtained as directed by Order L., r. 3, and unless the costs had been either expressly given under such order, or made costs in the action. He referred to *Mitchell* v. *Darley Colliery Co.* (1), where it was held that "the judge must direct how the costs of inspection are to be paid or they cannot be recovered by either party." He further said that it had never been the practice of the taxing master to allow the costs of an inspection of the subject-matter of an action without some express direction.

This was a summons by the defendants to review the taxation.

Younger, K.C., and *A. J. Walter*, for the defendants.
T. Terrell, K.C., and *J. C. Graham*, for the plaintiff.

JOYCE J. The inspection is found and also admitted to be necessary and proper, and I think it would be the worst possible precedent if the costs of it were disallowed merely because the inspection was made without an order of the Court having been obtained. I therefore allow these costs.

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Ramsden, Sykes & Ramsden, Huddersfield.*

Solicitors for plaintiff: *W. J. & E. H. Tremellen, for Blair & Seddon, Manchester.*

(1) (1883) 10 Q. B. D. 457.

G. A. S.

JOYCE J.
1904
Feb. 6, 20.

ASHWORTH *v.* ENGLISH CARD CLOTHING COMPANY, LIMITED (No. 2).

[1899 A. 1180.]

Costs—Interest—Costs paid by unsuccessful Party — Repayment on successful Appeal—Intermediate Interest—Satisfaction of Judgment Debt—Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *s.* 17.

A plaintiff whose action was dismissed with costs paid the defendants' costs with interest to date. The Court of Appeal having reversed the decision of the Court of first instance, the defendants repaid the sum they had received with interest to date. Upon further appeal the House of Lords restored the original order, whereupon the plaintiff repaid to the defendants the sum he had received from them, but without any further interest:—

Held, that the defendants were entitled to interest on that sum from the time when they had paid it to the plaintiff down to the time of repayment to themselves.

MOTION.

On June 22, 1901, the plaintiff's action for infringement of his letters patent was dismissed with costs by Joyce J.

On March 26, 1902, the plaintiff paid the defendants' costs with interest to date amounting to 1042*l.*

On July 11, 1902, an appeal by the plaintiff to the Court of Appeal was allowed; and on July 21 the defendants repaid to the plaintiff the sum of 1042*l.* with interest to date.

The defendants appealed to the House of Lords, and on November 9, 1903, the appeal was allowed and the original order restored.

On November 23 the plaintiff repaid to the defendants the sum of 1042*l.* with interest to July 21, 1902.

This was a motion by the defendants claiming payment by the plaintiff of the sum of 51*l.* for interest at 4 per cent. on the amount repaid to them in respect of the period from July 21, 1902, to November 23, 1903.

Younger, K.C., and *A. J. Walter*, for the defendants. The costs carry interest until they are paid. They were not paid

until November 23, 1903, and the defendants are entitled to interest so long as they remained unpaid, i.e., from July 21, 1902, down to the date of payment.

The decision in *Edge & Sons* v. *Gallon & Son* (1), which seems to be against our contention, does not govern this case.

T. Terrell, K.C., and *J. C. Graham*, for the plaintiff. In order to succeed, the defendants must bring their case within s. 17 of the Judgments Act, 1838. That section provides that "every judgment debt shall carry interest at the rate of 4*l.* per cent. per annum from the time of entering up the judgment until the same shall be satisfied." This case is not within that section.

Younger, K.C., in reply.

Cur. adv. vult.

Feb. 20. JOYCE J. In this case, in the Court of first instance, the plaintiff's action was dismissed with costs on June 22, 1901. On March 26, 1902, the plaintiff paid the defendants' costs, 1013*l.*, with interest to date, amounting altogether to 1042*l.*

On July 11, 1902, the order of the Court below was reversed by the Court of Appeal, and on the 21st of the same month the defendants, being required to do so by the plaintiff, returned to him the amount he had paid for costs and interest as I have stated.

Now pausing here, it appears to me that at this time matters stood in the same position with reference to these costs as if the plaintiff had never paid or been ordered to pay them.

On November 9, 1903, the House of Lords reversed the order of the Court of Appeal and restored the original judgment. The plaintiff is willing to repay, or I should rather say has repaid, the defendants' costs and interest that were returned to him after the order of the Court of Appeal, this interest being interest on the defendants' costs from the date of the original judgment to July 21, 1902. He objects, however, to pay interest on those costs for the period since July 21, 1902, although he has had the money in his hands, without, as it

(1) [1899] W. N. 137.

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ultimately turns out, being entitled thereto. But, by law, if these costs had never been paid at all, the defendants would be now entitled to have them with interest from the date of the original judgment, and I think that they ought not to be in a worse position by reason of having under an order of the Court of Appeal, now reversed, returned to the plaintiff the amount of these costs with interest to July 21, 1902. I think that this return of costs demanded by and received by the plaintiff put the defendants in the same position as if these costs had never been paid by the plaintiff. Therefore the present application for interest upon these costs since July 21, 1902, ought to be allowed. I should add that the case of *Edge & Sons* v. *Gallon & Son* (1) was in my opinion materially different. There the costs refunded were simply costs which an erroneous order of the Court below, subsequently reversed, compelled the defendant to pay, and there was no statute or rule entitling the defendant to interest on the costs so refunded. An order must be made according to the notice of motion.

Solicitors: *Rowcliffes, Rawle & Co., for Ramsden, Sykes & Ramsden, Huddersfield; W. J. & E. H. Tremellen, for Blair & Seddon, Manchester.*

(1) [1899] W. N. 137.

G. A. S.

COLWELL *v.* ST. PANCRAS BOROUGH COUNCIL.

JOYCE J.

1904

Feb. 3, 4, 5, 8

[1903 C. 3821.]

Nuisance—Vibration—Noise—Electric Generating Station—Borough Council—Statutory Powers—Provisional Order under Electric Lighting Act—Construction of Works—Temporary Nuisance—Injunction.

The defendants, a borough council, acting under a provisional order, erected an electric generating station in proximity to houses of which the plaintiffs were lessees and occupiers. The order provided that nothing therein should exonerate the undertakers from an action for nuisance in the event of any being occasioned by them. In an action for an injunction it was admitted that the vibration caused by the defendants' machinery constituted an actionable nuisance unless it was excusable upon the ground of being merely temporary. The defendants alleged that the nuisance could be removed in time by experiment and alteration of the machinery; and contended that until the machinery was perfected the construction of their works was not complete, and the action would not lie against them:—

Held, that the nuisance was not temporary, nor were the defendants to be excused within the principle laid down in *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; and that the defendants were not entitled to carry on their works unless or until they could do so without creating a nuisance. An injunction was granted during the continuance of the plaintiffs' leases.

One of the plaintiffs had granted a sub-lease for the remainder of his term less the last three days thereof:—

Held, that he was entitled to an injunction in respect of injury to his reversion.

TRIAL OF ACTION.

The first five plaintiffs were the lessees and occupiers of certain houses on one side of Great College Street, in the parish of St. Pancras. The sixth plaintiff, one Stone, was the lessee of one of the houses who had granted a sub-lease for the whole of his term less the last three days thereof. The houses were three storeys in height, and had been built many years. The upper storeys were residential, the premises on the ground floor being used as shops. The defendants had acquired the freehold interest in all the houses subject to the leases.

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At a distance of from fifty to a hundred feet from the plaintiffs' houses the defendants, acting under a provisional order under the Electric Lighting Act, 1882, had in 1894 erected an electric generating station, and from that time down to the date of the action had supplied electricity to the streets and houses in the neighbourhood. In 1902 the plaintiffs became aware that the defendants intended to erect new works and to increase their electrical plant and machinery. Against this the plaintiffs protested, on the ground that it was likely to add to the nuisance and annoyance arising from the vibration and noise of the machinery from which they already suffered. The defendants nevertheless erected their new machinery, which included two large engines of 750 horse-power each. They began to use the new engines and machinery in May, 1903. In November, 1903, the plaintiffs commenced this action for an injunction to restrain the defendants from causing nuisance to the plaintiffs and damaging the value of their interests in the said houses by vibration and noise from the generating station, and also from interfering with the use and enjoyment by the plaintiffs of their houses by vibration and noise. There was evidence that before the extension of the works the plaintiffs had suffered annoyance from vibration and noise, and since the new works had been started the annoyance had been much increased, and now constituted an intolerable nuisance, destructive of ordinary comfort and injurious to health. The defendants' evidence went to shew that the new engines were at present defective in balance and consequently did not run smoothly, but that this defect could be remedied in time, though it might take several months to do it. The defendants contended that, until the machinery had been got into perfect working order, the works could not be said to have been completely constructed.

The provisional order by which the defendants were authorized to carry out the works provided that nothing in the order should exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being occasioned by them.

Hughes, K.C., and *E. Beaumont*, for the plaintiffs. There has been and still is such a nuisance to the plaintiffs from the vibration, caused by the defendants' works, as to entitle the plaintiffs to an injunction and damages. It is no answer to say that the works are situated in an industrial neighbourhood: *St. Helens Smelting Co.* v. *Tipping*. (1) The right to commit a nuisance cannot be acquired by user, unless during the period of user the nuisance complained of has been actionable: *Sturges* v. *Bridgman*. (2)

Bousfield, K.C., *Younger, K.C.*, and *A. B. Marten*, for the defendants. The defendants have erected these works and machinery in discharge of their statutory duty. If in doing this they have caused a temporary nuisance, which can and will be remedied in a short time, an action for damages will not lie against them: *Sutton* v. *Clarke*. (3) The defendants have erected the best known type of engines and plant, and the evidence shews that when they are in thorough working order the nuisance from vibration and noise will cease. We admit that there was a nuisance from vibration before January 8, but there has been little complaint since. The plaintiffs are not entitled to an injunction. Dwellers in a town must submit to the consequences of the operations of trade which are for the benefit of the inhabitants and the general public: *St. Helens Smelting Co.* v. *Tipping*. (1) If an injunction is to be granted, its operation should be suspended for a reasonable time: *Shelfer* v. *City of London Electric Lighting Co.* (4)

Hughes, K.C., in reply. It is admitted that down to the end of December, 1903, there was such vibration as, if it had been occasioned by private individuals, and was not merely temporary, would have given the plaintiffs a ground of action. It is said, however, (1.) that the defendants are a public authority; and (2.) that the nuisance, if any, is merely temporary.

This cannot be said to be a temporary nuisance, and it is not caused in the construction or execution of the defendants' works. It cannot be justified as a common and ordinary user

(1) (1865) 11 H. L. C. 642.
(2) (1879) 11 Ch. D. 852.
(3) (1815) 6 Taunt. 29; 16 R. R. 563.
(4) [1895] 2 Ch. 388.

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of the land: *Bamford* v. *Turnley*. (1) The defendants here are in exactly the same position as the defendants were in *Shelfer* v. *City of London Electric Lighting Co.* (2) The municipality is, for this purpose, the same as a commercial corporation. It was contended in that case that the provisional order protected the undertakers, and that, if a nuisance were necessarily created by the carrying on of the company's undertaking, such nuisance was authorized, and even imposed as a duty on the undertakers. That argument was swept away by Lord Halsbury in giving judgment in the Court of Appeal. (3) In *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (4) it was held that the defendants had no statutory authority so to construct their works as to occasion a nuisance.

Nuisance is clearly proved in this case, and the plaintiffs are entitled to an injunction against the defendants restraining them from using or working their generating station so as to cause a nuisance to the occupants of the houses, or so as to injure the fabric thereof.

Cur. adv. vult.

Feb. 8. JOYCE J. This action was instituted on November 30, 1903, and it was virtually admitted before me—for in truth it could not be denied—that, by reason of the vibration caused by the defendants' works at various times and from time to time between the months of May and December, the plaintiffs had a right to complain of the annoyance to which they had been subjected, or, rather, a right to complain unless it was merely a temporary annoyance, and that it was such an annoyance as that, if continued, the defendants could not deny it to be a nuisance in law. That, as I say, was virtually admitted; but at all events, if necessary, I decide on the facts that that is so. In other words, it appears to me that, by the vibration caused by the defendants' works and machinery, so much annoyance has been occasioned to the plaintiffs as to justify the action, unless the defendants can shew that they

(1) (1860-2) 3 B. & S. 62.
(2) [1895] 1 Ch. 287.
(3) [1895] 1 Ch. 309.
(4) [1899] 2 Ch. 217.

are excused by reason of its being, as they allege, a temporary nuisance, or something in the nature of the annoyances referred to, by Lord Justice, then Mr. Justice, Vaughan Williams in the case of *Harrison* v. *Southwark and Vauxhall Water Co.* (1) I am of opinion that the amount of the annoyance caused has occasioned material interference with the comfort of the plaintiffs. As Jessel M.R. said in *Broder* v. *Saillard* (2): "The law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise"—and of course if he causes such vibration—"as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it." I am of opinion that there has been such annoyance in this case. But it was suggested, rather mildly, I think, that the defendants were entitled to be excused by reason of the passage I have referred to in the judgment of Vaughan Williams J. Were the annoyances occasioned within the principle of that statement of the law? In my opinion they were not. The principle is stated and worked out, and no doubt correctly, by Bramwell B. in *Bamford* v. *Turnley* (3), and the same judgment deals satisfactorily to my mind with the question whether a defendant is entitled to be excused on the mere ground that the annoyance which he occasions is temporary. In this particular case the annoyance caused has not been a mere temporary and occasional personal inconvenience, but in my opinion is such as is calculated (I do not say it has done that, but it is calculated) to work material injury to the property of the plaintiffs, and, beyond all question, if that be a ground of action (which I do not think it is), most seriously to depreciate the value of the plaintiffs' property. Now I am not aware that it has ever been suggested that nuisance by vibration, actual physical shaking of the plaintiff's house or property, is within the principle referred to by Vaughan Williams J., and dealt with by Bramwell B. In this particular case there is a clause in the order that authorizes the

(1) [1891] 2 Ch. 409. (2) (1876) 2 Ch. D. 692, 701.
(3) 3 B. & S. 83.

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works which says: "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being occasioned by them." What it really comes to is this—that, notwithstanding that order, it is suggested that for months, it may be for years after the first erection or construction of the works, the defendants are entitled to make the neighbourhood uninhabitable, or to cause serious annoyance to the neighbours until the time shall have arrived when they have contrived or managed in some way or other to carry on their works without creating a nuisance. What is to happen in such a case, or in this case, if they never succeed in doing that, no one has told me. However, that proposition or suggestion was not laid down very positively, and it is to me entirely novel and strange, and one to which I am quite unable to accede. I would rather say that after the construction of their works, if not before, the owners of those works, particularly under an order such as this, are not entitled to carry them on at all, unless or until they can do so without occasioning a nuisance to the neighbouring owners of property.

Then as to the old machinery, it appears it has not been stopped altogether, but is used occasionally during the night. At all events, it has not been going long enough for the defendants to acquire a right as against any of these plaintiffs to work that machinery so as to occasion a nuisance, although it is quite clear they would not have been able to get an injunction on an interlocutory application; but at the hearing delay is immaterial, unless it be long enough—twenty years or something of that kind—to create a right in the defendants. Under these circumstances there must be an injunction, not distinguishing in any way between the old machinery and the new. The injunction will be to restrain the defendants from carrying on these works in such a way as to cause a nuisance or injury to the plaintiffs—that is, during the continuance of their leases.

Younger, K.C. The plaintiff Stone is only entitled to a reversion of three days in his house. He cannot maintain this

action. In *Shelfer* v. *City of London Electric Lighting Co.* (1) there was evidence of serious and permanent injury to the reversion. That is not so here.

JOYCE J. I hold that there is a nuisance calculated to injure the reversion. It is calculated to destroy the houses. I grant an injunction in Stone's case in respect of vibration as to his reversion.

Younger, K.C. I ask for a suspension of the injunction.

JOYCE J. You may have six months.

Solicitors: *Beaumont & Son; Cunliffes & Davenport.*

G. A. S.

In re FRENCH-BREWSTER'S SETTLEMENTS. WALTERS *v.* FRENCH-BREWSTER.

[1903 F. 1144.]

Merger—Charge—Unraised Portion—Intestacy of Portioner—Owner of Land Next of Kin—No Administration—Merger of Beneficial Interest.

An owner of freehold land who became entitled to an unraised portion charged thereon, as next of kin to an intestate portioner, died without taking out administration to the portioner's estate.

It would have been for the landowner's benefit to merge the charge.

Held, that the landowner's beneficial interest in the charge, subject to the liabilities (if any) of the portioner's estate, had merged in the land.

Lord Compton v. *Oxenden*, (1793) 2 Ves. Jun. 261; 4 Bro. C. C. 397, *Forbes* v. *Moffatt*, (1811) 18 Ves. 384, 390; 11 R. R. 222, and *Swabey* v. *Swabey*, (1846, 1848) 15 Sim. 106, 502, followed.

In re Radcliffe, [1892] 1 Ch. 227, distinguished.

ORIGINATING SUMMONS.

Under settlements of 1876 and 1891, and in the events that happened, certain freehold land which the settlor covenanted would continue of the full clear yearly value of 1800*l.* stood limited (subject to a pin-money term and life estate charges) to the settlor for life, with remainder (subject to a jointure,

(1) [1895] 1 Ch. 287.

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a jointure term, and a term for securing two portions of 7500*l.* for his second and third sons) to the settlor in fee.

By his will dated January 28, 1895, the settlor, after bequeathing certain legacies and an annuity, partitioned the land among his three sons severally in strict settlement with cross-remainders, and bequeathed his residuary personalty to his executors upon trust to purchase lands to be settled on his first, second, and third sons successively in strict settlement.

On January 24, 1900, the second son died a bachelor and intestate, leaving the settlor his sole next of kin. His portion had not been raised, and, as he had practically no other property, the settlor did not take out administration.

The settlor died on May 21, 1901, and his executors subsequently took out administration to the second son.

This summons was issued to determine (inter alia) whether the second son's portion had merged in the land, or whether it was still raisable for the benefit of the settlor's personal estate.

Eve, K.C., and *E. J. Elgood*, for the trustees of the settlements.

R. H. Hodge, for the third son. The settlor was not entitled to keep the charge alive against the third son: *Otter* v. *Lord Vaux*. (1) In any case, the fact that he did not take out administration to his second son, and made no mention of the charge in his will, shewed an intention to merge it: *Swinfen* v. *Swinfen* (2); in addition to which, having regard to his covenant, merger was clearly for his benefit, and therefore took effect: *Tyrwhitt* v. *Tyrwhitt*. (3)

Hon. Frank Russell, for the eldest son. There is no merger in the present case. The settlor never became entitled to the charge, as he did not take out administration to his second son, and the executors who have taken out administration have not got the land.

If the settlor had taken out administration, there would still have been no merger, as he would have held the land and the charge in different capacities: *In re Radcliffe*. (4)

(1) (1856) 6 D. M. & G. 638.
(2) (1860) 29 Beav. 199.
(3) (1863) 32 Beav. 244.
(4) [1892] 1 Ch. 227, 231.

Vernon Smith, K.C., and *A. E. Russell*, for the executors.

Martelli, for the jointress.

Hodge, in reply. If the settlor had taken out administration, there would of course have been no merger of his estate quâ administrator. But his beneficial interest in the surplus remaining after payment of the liabilities (if any) of the son's estate merged in equity, although the charge and the term were both outstanding at law: *Forbes* v. *Moffatt* (1); *Swabey* v. *Swabey* (2); *Swinfen* v. *Swinfen*. (3) The charge and the term were both inert, and remained part of the land until some one had an equity to raise the charge. The present administrators may no doubt raise the charge to pay any liabilities of the son's estate, but they have no equity to raise it for the benefit of the settlor's personal estate, and the surplus therefore sinks back into the land: *Swabey* v. *Swabey*. (2)

Cur. adv. vult.

Feb. 23. SWINFEN EADY J. The question is whether the 7500*l.* portion to which the settlor became beneficially entitled on the intestacy of his second son has sunk into the land out of which it was to be raised, or whether it must be treated as still subsisting and forming part of the settlor's personal estate.

In my opinion, having regard to the settlor's covenant that the land should continue of the full clear yearly value of 1800*l.*, it was clearly for his benefit that the charge should sink into the land. The extinction of this charge would reduce the settlor's liability on the covenant, and the land charged would become a better security for the third son's portion. Again, the settlor never manifested any intention of keeping the charge alive, and, although he survived his second son nearly eighteen months, he did not take out administration.

The objection urged to the merger or extinguishment of the charge is that the settlor did not own the land and the charge in the same right. He was entitled to the land beneficially,

(1) (1811) 18 Ves. 384, 390; Tudor's Real Property Cases, 4th ed. 244; 11 R. R. 222.

(2) 15 Sim. 106, 502.

(3) 29 Beav. 199.

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but was only entitled to the charge upon taking out administration to his second son, so that the son's debts (if any) would have to be paid, before the settlor's title to the residue was cleared.

The answer to the objection is that no question of merger arises until all debts and other claims (if any) against the second son's estate have been discharged. It is only in respect of the settlor's beneficial interest in the son's estate that merger arises, so that no prejudice can be occasioned to third parties. It is not contended that, if the settlor had taken out administration to his second son, merger would have taken place at once, irrespective of the son's liabilities. The settlor would not in that case have been entitled to the land and the charge in the same right, and there would not have been any merger to the prejudice of the son's creditors: *In re Radcliffe.* (1)

This, however, does not affect the question before me, which is whether the settlor's own beneficial interest in the charge, as sole next of kin to his son, has not merged, and in my opinion it has.

Having once arrived at the conclusion that it was for the settlor's benefit that his beneficial interest in the charge should merge, I see nothing to prevent its extinguishment. It is established by authority that where the owner of land becomes beneficially entitled to a charge thereon as next of kin to the incumbrancer, the charge will merge, if merger is for the landowner's benefit, even though some person other than the landowner becomes the legal personal representative of the incumbrancer, and even though the charge be secured by an outstanding term vested in trustees for the purpose of raising it. This was decided by Lord Loughborough L.C. in *Lord Compton* v. *Oxenden.* (2) In that case a lunatic was entitled to land, and his sister was entitled to two sums of 1500*l.* secured thereon, one sum being secured by a trust term. The sister died intestate, leaving her brother her sole next of kin. After the brother's death, his next of kin filed a bill, claiming that the two sums of 1500*l.* formed part of his personal estate. The heir-at-law, on the other hand, insisted that

(1) [1892] 1 Ch. 227. (2) 2 Ves. Jun. 261; 4 Bro. C. C. 397.

he inherited the land free from any charge in favour of the personal estate. It was urged on the plaintiff's behalf that the two sums of 1500*l.* would have been liable to the sister's debts, and that in the absence of any election by the lunatic brother, it ought not to be held that the charge had merged, merely because the lunatic had become entitled to the benefit thereof, as sole next of kin to his sister. Lord Loughborough L.C., however, held that the heir took the land, discharged from the burden, which had become merged in the inheritance, and that it made no difference that one of the two sums was secured by a trust term.

This authority is precisely in point, and the circumstances are undistinguishable from those of the present case.

In *Forbes* v. *Moffatt* (1) Grant M.R., when discussing the merger or extinguishment of charges, said: "Upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged."

Again, in *Swabey* v. *Swabey* (2) Shadwell V.-C. held that certain charges on real estate were kept alive so far as was necessary for the payment of certain debts and legacies, and subject thereto sank into the inheritance, and that the next of kin had no equity to have the balance of the charges raised and paid to them.

I therefore decide that the settlor's beneficial interest in the second son's portion of 7500*l.* has sunk into the inheritance.

Solicitors: *Gush, Phillips, Walters & Williams; Martineau & Reid; Robert Todd.*

(1) 18 Ves. 384, 390; 11 R. R. 222.

(2) 15 Sim. 106, 502.

G. R. A.

FARWELL J.

1904

Feb. 26; *March* 1.

LAWSON *v.* REYNOLDS.

[1903 L. 2716.]

Local Government—Municipal Borough—Borough Justices—County Justices—Petty Sessional Division—Borough without separate Commission of the Peace—"Business of the Borough"—Chairman of Justices—Mayor of Borough—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 154, 155, 158.

Where a borough has no separate commission of the peace and no Court of quarter sessions, and its charter contains no non-intromittant clause prohibiting the county justices from acting within the borough, the county justices and borough justices have co-ordinate jurisdiction in all matters arising within and relating to the borough.

In such a case, when once a matter has been earmarked as county business or borough business by the issue of a proper summons to appear before the county or the borough tribunal, as the case may be, the county justices or the borough justices, as the case may be, have seisin of it to the exclusion of the other set of justices, although the latter have concurrent jurisdiction and may sit with them to hear the matter.

And in such a case, when once a matter arising within the limits of the borough has been earmarked as county business, the mayor of the borough, though a county justice as well as a borough justice, is not entitled under s. 155 of the Municipal Corporations Act, 1882, to act, virtute officii, as chairman of the county justices.

The principle of *Rex* v. *Sainsbury*, (1791) 4 T. R. 451; 2 R. R. 433, followed.

THIS was an action by the mayor of Hornsey against certain justices of the county of Middlesex claiming a declaration that, by virtue of s. 155 of the Municipal Corporations Act, 1882 (1),

(1) The Municipal Corporations Act, 1882, enacts (s. 154): "Where a borough has not a separate Court of quarter sessions, the justices of the county in which the borough is situate shall exercise the jurisdiction of justices in and for the borough as fully as they can or ought in and for the county. . . ."

Sect. 155: "(1.) The mayor shall, by virtue of his office, be a justice for the borough, and shall, unless disqualified to be mayor, continue to be such a justice during the year next after he ceases to be mayor. (2.) The mayor shall have precedence over all other justices acting in and for the borough, and be entitled to take the chair at all meetings of justices held in the borough at which he is present by virtue of his office of mayor; except that he shall not by virtue of this section have precedence over the justices acting in and for the county

he was entitled to precedence over all justices of the peace for the county when sitting at petty sessions within the borough and acting in relation to the business of the borough.

The borough of Hornsey, before its incorporation, formed part of the Highgate petty sessional division of the county of Middlesex, and the justices of the county held petty sessional Courts at Hornsey in relation to matters arising there.

On August 17, 1903, the borough of Hornsey was incorporated by Royal Charter; and on November 9 the plaintiff was elected the first mayor of the borough, and took the oath of allegiance and the judicial oaths required to be taken by a justice of the peace for the borough, and also by a justice of the peace for the county. The borough has not a separate commission of the peace, nor a separate Court of quarter sessions for the county, and its charter does not contain a non-intromittant clause forbidding the county justices from acting within the borough; and after the incorporation of the borough the county justices continued to hold petty sessional Courts at Hornsey, and to exercise the same jurisdiction as before in relation to all matters arising within the limits of the borough. On December 9 the county justices sat at Hornsey in petty sessions to hear (inter alia) an information laid against one Gerald Herman for an offence committed within the limits of the borough. The summons had been granted and was signed by a county justice. When the case was called, the plaintiff claimed, as mayor, the right to take the chair on the ground that he was, under s. 155 of the Municipal Corporations Act, 1882, entitled to do so in all cases where the offence had been committed within the borough. His right was not admitted; and thereupon he brought this action to determine the question.

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in which the borough or any part thereof is situate, unless when acting in relation to the business of the borough, or over any stipendiary magistrate engaged in administering justice."

Sect. 158: "(1.) A justice for a borough shall, with respect to offences committed and matters arising within the borough, have the same jurisdiction and authority as a justice for a county has under any local or general Act with respect to offences committed and matters arising within the county. . . ."

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Macmorran, K.C., and *E. Beaumont*, for the plaintiff. The position of borough justices and county justices is defined in *Reigate Corporation* v. *Hart.* (1) Borough justices can exercise the same jurisdiction as county justices in relation to all matters arising within the borough, whether borough business or county business; and the mayor and ex-mayor when sitting together form a quorum for the despatch of business, and they could have granted and heard this summons: s. 158 of the Act; *Reg.* v. *Whittles* (2); *Wilson* v. *Strugnell.* (3) There is no reason why the words "business of the borough" in s. 155 of the Act should be cut down and limited strictly to business coming before the justices as borough business so long as the matter arises within the borough; and the mayor, as mayor, is entitled under the section to take the chair at all meetings of justices when sitting as a petty sessional Court at Hornsey and dealing with business of the borough, whether borough business or county business. We do not rely on the words "shall have precedence over," because the same words occur in s. 57 of the Municipal Corporations Act, 1835, and have been held to mean social and not magisterial precedence: *Ex parte Mayor of Birmingham* (4); but we rely on the words "shall be entitled to take the chair at all meetings of justices," &c.

Warmington, K.C., *Danckwerts, K.C.*, and *Eustace Hills*, for the defendants. It is submitted that sub-ss. 1 and 2 of s. 155 must be read together and refer to borough justices, and that the words "all other justices" in sub-s. 2 mean "all other borough justices," and that the mayor is to take the chair at all meetings of "such justices." But if not, we contend sub-s. 2 does not entitle the mayor to act as chairman when the county justices are sitting as a petty sessional division. Prior to the incorporation of the borough, there was no distinction between the parish of Hornsey and any other part of the division of Highgate, and the county justices were the only justices that had jurisdiction in the division. The incorporation of Hornsey, part of the division, did not oust or affect the jurisdiction of the county justices which they had before the

(1) (1868) L. R. 3 Q. B. 244.
(2) (1849) 13 Q. B. 248.
(3) (1881) 7 Q. B. D. 548.
(4) (1860) 30 L. J. (Q.B.) 2.

incorporation. Therefore the administration of justice has to be done by the same persons and in the same manner and at the same place: that is recognised by s. 154 of the Act. Borough justices can only act within the borough: *Jones* v. *Williams* (1); and where a charter contains no non-intromittant clause, as in the present case, the jurisdiction of the county justices is not excluded, and they have concurrent jurisdiction in the borough with the borough justices: *Blankley* v. *Winstanley* (2); *Rex* v. *Sainsbury* (3); *Rex* v. *Amos* (4); *Reg.* v. *Williamson.* (5) Therefore, when the county justices sit at Hornsey as a petty sessional division to hear a matter brought before them as county justices, they have prior seisin of the matter as county business, and the meeting cannot be converted into a meeting for borough business and the mayor cannot claim to be chairman although the offence was committed within the borough. "Business of the borough" means business treated as business of the borough, and not business being treated as "petty sessional business," although it may also be business of the borough.

[*Darley* v. *Reg.* (6) and *Huntingdon Corporation* v. *Huntingdon County Council* (7) were also referred to.]

Macmorran, K.C., in reply.

Cur. adv. vult.

March 1. FARWELL J. The mayor of Hornsey claims a declaration that he is entitled, by virtue of s. 155 of the Municipal Corporations Act, 1882, to precedence over all justices of the peace for the county when sitting at petty sessions within the borough and acting in relation to the business of the borough under the following circumstances. The borough of Hornsey forms part of the county of Middlesex, and was incorporated by Royal Charter of August 17, 1903. The plaintiff was duly elected mayor of the borough on November 9, 1903, and has taken the oath of allegiance and

(1) (1825) 3 B. & C. 762; 27 R. R. 474.
(2) (1789) 3 T. R. 279, 286; 1 R. R. 704.
(3) 4 T. R. 451; 2 R. R. 433.
(4) (1819) 2 B. & Al. 533; 21 R. R. 386.
(5) (1891) 7 Times L. R. 534.
(6) (1846) 12 Cl. & F. 520, 539.
(7) [1901] 2 K. B. 257.

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the judicial oaths required to be taken by a justice of the peace for the borough and also by a justice of the peace for the county. The borough has not a separate Court of quarter sessions, nor has it a separate commission of the peace, and the county justices continue to hold petty sessional Courts for the Highgate division in exactly the same way as they held them before the incorporation, and their jurisdiction is in no way abridged or affected by the incorporation. The question turns on the true construction of s. 155 of the Municipal Corporations Act, 1882, which is as follows: "(1.) The mayor shall, by virtue of his office, be a justice for the borough, and shall, unless disqualified to be mayor, continue to be such a justice during the year next after he ceases to be mayor. (2.) The mayor shall have precedence over all other justices acting in and for the borough, and be entitled to take the chair at all meetings of justices held in the borough at which he is present by virtue of his office of mayor; except that he shall not by virtue of this section have precedence over the justices acting in and for the county in which the borough or any part thereof is situate, unless when acting in relation to the business of the borough, or over any stipendiary magistrate engaged in administering justice." The Act obviously contemplates that the mayor will sit with the county justices, and gives him the right to take the chair at all meetings of justices held in the borough at which he is present virtute officii, and not merely at meetings of borough justices, for, having regard to the exception, I cannot read "justices" as if it were "such justices." This right to attend meetings of the county justices is in accordance with the general law as laid down in *Rex* v. *Amos* (1), and stated by Blackburn J. in *Reigate Corporation* v. *Hart* (2), that in a borough where there is no Court of quarter sessions and no non-intromittant clause in the charter (which is this case) the justices of the borough have no exclusive jurisdiction within the borough and no jurisdiction beyond the borough, but act in ease and in aid of the county justices, so far as they act upon what are at the same time borough and county offences, and all acts that the borough

(1) 2 B. & Al. 533; 21 R. R. 386. (2) L. R. 3 Q. B. 244.

justices can do can be done by the county justices. The county justices and the borough justices have exactly the same powers and authorities, but the ambit of the exercise of such powers is different—that of the county justices includes, and that of the borough justices is limited to, offences committed within the borough. They may act together: per Lord Kenyon, *Rex* v. *Sainsbury* (1); and the county justices cannot lawfully exclude the borough justices: *Reg.* v. *Williamson* (2); and the county justices can, if they please, sit with the borough justices in petty sessions for the borough and dispose of borough business. This brings me to the consideration of the exception. I observe that the sub-section begins by giving precedence and the right to take the chair, while the exception specifies precedence only, and I do not forget that under the Act 5 & 6 Will. 4, c. 76, it was held that words giving precedence only applied to social and not to magisterial precedence, e.g., *Ex parte Mayor of Birmingham* (3); but I do not think that it is possible so to limit the exception, having regard to the reference to business. The next question, to my mind, is, "What is meant by 'the business of the borough'?" The facts in the present case, and on which alone I express an opinion, are as follows: On December 9, 1903, the county justices for the petty sessional division of Highgate sat at Hornsey in petty sessions. The business of the Court included an information laid against Gerald Herman for throwing stones within the borough on a summons against Herman signed by a county justice. On the case being called on the mayor claimed the right to take the chair, on the ground that he was entitled so to do on all cases in which the offence had been committed within the borough. His right was not admitted, and this action is brought to establish such right. I am of opinion that the mayor has no such right. The Court was sitting as a petty sessional division, not as petty sessions. The summons was granted by a county justice, and the county justices had full jurisdiction to deal with the case. The fact that if there were a mayor and ex-mayor, so as to constitute a quorum,

(1) 4 T. R. 456; 2 R. R. 437. (2) 7 Times L. R. 534.
(3) 30 L. J. (Q.B.) 2.

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they could have sat in petty sessions (see *Reg.* v. *Whittles* (1)), and have granted a summons to bring the prisoner before them, does not make the trial of this offence business of the borough. It was, in fact, business of the county, and not the less so because it might in certain events have been dealt with as business of the borough. Even if there were a quorum of borough justices, they could not as such try the case after the jurisdiction of the county justices had attached. When a case has once been earmarked as county business or borough business by the issue of a proper summons to appear before the county or the borough tribunal, as the case may be, the county justices or the borough justices, as the case may be, have seisin of it, and the other body of justices, although having concurrent jurisdiction, cannot intercept the case. The question before me is governed, in my opinion, by the decision of the Court of King's Bench in *Rex* v. *Sainsbury* (2), that where two sets of magistrates have a concurrent jurisdiction and one appoints a meeting to grant ale licences, their jurisdiction attaches so as to exclude the others, although both might sit together. In that case the mayor and some of the aldermen of the City had by charter jurisdiction in Southwark, but as the charter contained no non-intromittant clause the justices of Surrey had a concurrent jurisdiction. Lord Kenyon says (3): "But another question has arisen, and which is proper should be settled, whether it be legal (for whether it be decent or decorous no person can doubt) for two different sets of magistrates, having concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction. It is of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. The facts in this case are shortly these; some of the justices for the county of Surrey, having before them the statute of 26 Geo. 2, and knowing that the licenses ought to be granted on a certain day and time, appointed a day, September 4, for licensing alehouses in this division, on which day they accordingly held their meeting; and certain of the magistrates of the City of

(1) 13 Q. B. 254.
(2) 4 T. R. 451; 2 R. R. 433.
(3) 4 T. R. 456; 2 R. R. 437.

London, who in general are competent to this purpose, appointed another meeting on a subsequent day. But the jurisdiction of the justices who had appointed the first meeting had attached before this time; not indeed so as to exclude the City justices from acting at the first meeting, for they might all have acted together; but it excluded the City justices of their jurisdiction to act on the subsequent day. On the general question therefore I am clearly of opinion that the Surrey justices and the magistrates for the City have a co-ordinate jurisdiction within this district; and that the meeting of the City justices in this case was illegal, the jurisdiction of the other magistrates having first attached." In my opinion the mayor in the case before me could not issue a summons against, or hold a petty sessions for the borough on a prisoner already summoned before the county justices, because the jurisdiction of the latter had already appropriated it as county business, and by parity of reasoning he cannot be heard to intervene and say that it is borough business for the purpose of founding upon it a claim to take the chair at a meeting of the county justices sitting for the petty sessional division to try it. It was, in fact, ab initio and remained throughout county business. In the same way, if there were a borough petty sessions and the summons had required the prisoner to attend there, the county justices could not have intercepted it, and if they had chosen to sit at the borough sessions the mayor would have taken the chair. The result is that the action fails and is dismissed with costs.

Solicitor for plaintiff: *L. J. Tatham.*
Solicitor for defendants: *Sir Richard Nicholson.*

H. L. F.

C. A.
1904
March 10, 16, 17, 29.

In re FRASER.
LOWTHER *v.* FRASER.

[1903 F. 1019.]

Will—Construction—General Bequest—Exception—Specific Bequest of excepted Property—Failure by Death of Specific Legatee—"Chattel Real"—Rent-charge issuing out of Leaseholds—Vendor's Lien for unpaid Purchase-money—Intestacy—Liability of Next of Kin to discharge Lien—Real Estate Charges Acts, 1854 (*Locke King's Act*, 17 & 18 *Vict. c.* 113), *s.* 1; 1867 (30 & 31 *Vict. c.* 69), *s.* 2; 1877 (40 & 41 *Vict. c.* 34), *s.* 1.

A testator by his will, made in 1886, bequeathed all his personal estate, except what he otherwise disposed of by his will or any codicil thereto, and except chattels real, to trustees, upon the trusts therein mentioned. And he devised and bequeathed "all real estate and chattels real in England to which I may be entitled at my death, except what I have otherwise disposed of by this my will," to his brother absolutely for all his estate and interest therein.

The testator made seven codicils to his will, the last of which was made in July, 1898. In that codicil he stated that his brother was dead, but he did not revoke the bequest to him, or the general bequest of personalty, though he made some alterations in his will and the previous codicils. In other respects the testator confirmed his will as altered by the prior codicils.

In April, 1898, the testator entered into a contract for the purchase of a rent-charge issuing out of leasehold property in England. The testator died in August, 1898. At that time the contract had not been completed:—

Held, that, inasmuch as the will and codicils must be read together, and the will treated as if made at the date of the last codicil, it could not be taken that the testator had excepted chattels real from the general bequest merely for the purpose of giving them to his brother, but that they were excepted for all purposes, and that consequently there was an intestacy as to the chattels real, and they did not fall into the general bequest:

Held, also, that the rent-charge was a chattel real, and that the testator's next of kin were liable under the Real Estate Charges Acts, 1854, 1867, and 1877 to discharge the vendor's lien for unpaid purchase-money.

Decision of Byrne J., ante p. 111, affirmed.

Appeal from the decision of Byrne J. (1)

The questions were—(1.) whether a rent-charge issuing out of leaseholds was a "chattel real"; (2.) whether, if it was

(1) Ante, p. 111.

and it was undisposed of by the will of the testator, Locke King's Act of 1854 and the amending Acts of 1867 and 1877 applied to it, so that the testator's next of kin would take it subject to the liability to discharge a vendor's lien for unpaid purchase-money.

On April 7, 1898, Sir William Augustus Fraser entered into a contract for the purchase for 11,110*l.* of a rent-charge of 402*l.* issuing out of and charged upon leasehold hereditaments at Boscombe, in Hampshire, held for the residue of a term of years terminating on December 25, 1967. Sir William died on August 17, 1898, and in January, 1899, the trustees of his will completed the purchase and paid the purchase-money out of the testator's general personal estate, the rent-charge being conveyed to them as trustees of the will.

By his will dated December 1, 1886, the testator, after making various specific and pecuniary bequests, bequeathed "all the personal estate and effects to which I shall at my death be entitled or over which I shall at my death have a general power of appointment or disposition (except what I otherwise dispose of by this my will or any codicil hereto and except chattels real) unto and to the use of" trustees, upon trust that the trustees should out of the personal estate, or the proceeds of the sale and conversion thereof, pay his funeral and testamentary expenses, debts, and legacies (other than specific legacies), legacy, succession, and other duties, and should stand possessed of the residue of the personal estate upon trust for investment and accumulation during the term of twenty-one years from his death, and after the expiration of the term to hold the trust fund upon trust for successive tenants for life and remaindermen as therein mentioned. And the testator devised and bequeathed "all real estate and chattels real in England to which I may be entitled at my death, except what I have otherwise disposed of by this my will," to his brother Charles Craufurd Fraser absolutely for all his estate and interest therein.

Charles Craufurd Fraser died before the testator.

The testator made seven codicils to his will, by which he made various alterations in the disposition of his property.

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The seventh and last codicil, dated July 21, 1898, contained a recital of the death of the testator's brother Charles Craufurd Fraser. By this codicil the testator made some alterations in the dispositions of his property, but he did not revoke the gift of chattels real to his brother, or the general bequest of personalty. In other respects the testator confirmed his will as altered by the prior codicils.

A summons was taken out by the trustees of the will for the determination of (inter alia) the above questions.

Byrne J. held that the rent-charge was a chattel real, and that it passed as undisposed of by the will to the testator's next of kin, but subject, under the above Acts, to the obligation to discharge the vendor's lien for unpaid purchase-money.

Sir Keith Alexander Fraser, one of the testator's next of kin, appealed.

Levett, K.C., and *L. W. Byrne*, for the appellant. There are two questions in this case. (1.) Is this leasehold rent-charge a "chattel real"? (2.) Is it subject to the Real Estate Charges Act, 1877? (1) It is submitted that this rent-charge

(1) By the Act of 1854, s. 1, "When any person shall, after December 31, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debt charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise."

By the Act of 1867, s. 2, "In the construction of the said Act" (the Act of 1854) "and of this Act, the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator."

By the Act of 1877, s. 1, it is provided that the Acts of 1854 and 1867 "shall as to any testator or intestate dying after December 31, 1877, be

is not "land," is not a "hereditament," and is not the subject of "tenure." "Land" is defined by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, as including "messuages, tenements, and hereditaments, houses and buildings of any tenure." This rent-charge is obviously not land strictly so called, and is not a messuage or a house or a building. It is not a "tenement," for it is not the subject of tenure, and it is not a "hereditament," for it does not pass to the heir, and even if it were a hereditament it is not the subject of tenure, and the words "of any tenure" qualify all that goes before: see Burton on Real Property, 7th ed. c. vi. p. 321. Therefore this leasehold rent-charge is not land. Nor can it fall under the head of "other hereditaments of whatever tenure," for, as already stated, it does not pass to the heir, and it cannot be subject to any tenure, for "the receipt of a rent-charge is accessory or incident to no other hereditament": Williams on Real Property, 19th ed. p. 428. Further, the Act says that "the devisee or legatee or heir" shall not be entitled to have the debt discharged out of any other estate of the testator or intestate. The next of kin are not mentioned. The Act of 1877 is complete in itself, and should not be construed by the Act of 1854, as the learned judge has done. This is a casus omissus, and the result is that the next of kin are entitled to the rent-charge, without discharging the lien for unpaid purchase-money.

Leeke, for another of the next of kin.

Norton, K.C., and *Merivale*, for one of the cestuis que trust of the residue. It is submitted that there was no intestacy as

held to extend to a testator or intestate dying seised or possessed of or entitled to any land or hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate."

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regards the rent-charge, assuming that it is a "chattel real." This point was not taken in the Court below. The testator excepted "chattels real" from the general residuary bequest of personal estate merely for the purpose of giving them to his brother Charles; and that gift having failed by reason of the death of Charles before the testator, the chattels real fell into the residuary gift: *Blight* v. *Hartnoll* (1); *In re Bagot.* (2) It is submitted that for this purpose there is no distinction between lapse by reason of death and lapse by reason of remoteness, as in *Blight* v. *Hartnoll.* (1)

This gift of personal estate is a general residuary bequest. If property is excepted from such a bequest for a particular purpose and that purpose fails, the excepted property falls into the residue; but, if the property is excepted for all purposes, it does not go into the residue: *Bernard* v. *Minshull.* (3) It may be said that "chattels real" other than in England are within the exception—e.g., chattels real in Ireland. But this rent-charge is a chattel real in England, and it is immaterial what becomes of chattels real in Ireland. In order to shew that the general gift of personal estate is not a true residuary gift it must be shewn that the testator had chattels real in Ireland, and there is no evidence of that. It must be shewn that he has excepted property which he had at the date of the will, or, at any rate, at the time of his death: *Evans* v. *Jones.* (4)

It must perhaps be admitted that this rent-charge is a chattel real, though probably Lord Coke would not have so called it. "Chattel real" does not properly include anything but a physical occupancy of land for an interest less than a freehold interest. But, whether this rent-charge is or is not a chattel real, it is a "hereditament"—i.e., a species of property which is capable of being limited to heirs. It is not necessary for this purpose that it should in fact go to the heir. A "leasehold hereditament" is a chattel interest in a hereditament: *Tomkins* v. *Jones.* (5) The word "land" is not necessarily

(1) (1883) 23 Ch. D. 218.
(2) [1893] 3 Ch. 348, 351.
(3) (1859) Joh. 276, 295.
(4) (1846) 2 Coll. 516.
(5) (1889) 22 Q. B. D. 599, 602.

restricted to corporeal hereditaments: *Great Western Ry. Co.* v. *Swindon and Cheltenham Extension Ry. Co.* (1)

[VAUGHAN WILLIAMS L.J. referred to *Solomon* v. *Solomon.* (2)]

That case was decided on the Act of 1854. It is submitted that the rent-charge is a "hereditament" within the meaning of the Act of 1877. If not, it is "an estate or interest in land" within the meaning of the Act of 1854. The three Acts should be read together. The Acts apply to leaseholds: *In re Kershaw.* (3) A man cannot be seised of land, but only of an estate in land. A benevolent interpretation should be given to the Acts: *In re Kidd.* (4) Though "next of kin" are not expressly mentioned in s. 1 of the Act of 1877, yet, as "legatees" are mentioned, it can hardly be supposed to have been intended that next of kin should be excepted. The latter clause was really unnecessary, and the examples given in it do not cut down the prior part of the section. If you say that A. and B. shall not have a right, that does not give the right to C., who is not mentioned. When the next of kin take property which the Act has clearly charged, they must take it subject to the charge. Apart from the Act, there is no authority for saying that they take the property free from the payment of debts.

[STIRLING L.J. Suppose there were incumbered leaseholds: would the next of kin be entitled to have the mortgage debt discharged out of the other personal estate?]

By this will a fund is created for the payment of debts.

As to the exoneration of specific legacies from debts of the testator, see Theobald on Wills, 5th ed. p. 147. But no authority can be found as to the exoneration of next of kin. That may be the reason why next of kin are not mentioned in the Act of 1877.

In *In re Cockcroft* (5) there are some general observations as to the effect of the Acts.

Hon. F. Russell, for the trustees.

Levett, K.C., in reply. The authority of *Blight* v.

(1) (1884) 9 App. Cas. 787, 800, 803, 808.
(2) (1864) 33 L. J. (Ch.) 473.
(3) (1888) 37 Ch. D. 674.
(4) [1894] 3 Ch. 558.
(5) (1883) 24 Ch. D. 94.

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Hartnoll (1) must, of course, be accepted. But what is a residuary gift? It must include everything which the testator has when he makes his will or will acquire up to the time of his death, and which is not otherwise disposed of. It is immaterial whether the testator had Irish chattels real when he made his will. It is submitted that this gift was not a true residuary gift. The testator intended that whatever might happen chattels real should not pass by this gift. The will and all the codicils must be read together and treated as one. The testator contemplated the possibility of his acquiring real estate. By the codicil he confirmed the exception of chattels real in the will, and he did this after he knew of the death of his brother. This shews that the exception was not made solely for the benefit of the brother; there must have been some other reason: *Blight* v. *Hartnoll*. (2) The will did not dispose of all the property of which the testator was capable of disposing. The exception and the gift of excepted property not being coextensive, the reasoning of *Blight* v. *Hartnoll* (1) does not apply: *In re Bagot*. (3) As regards Locke King's Acts, it is submitted that this rent-charge is not a hereditament. A hereditament means, not that which is capable of passing to heirs, but that which does in fact pass to heirs. Every freeholder has an estate in land, the land itself belonging to the Crown: Challis on Real Property, 2nd ed. p. 43. No doubt in the case of land the word "hereditament" may describe the land itself as well as an estate in the land. But that has no application to an incorporeal hereditament, which has no physical existence. A rent-charge is a "hereditament" only if it descends to the heir. It is not the subject of tenure.

It is submitted that in *Great Western Ry. Co.* v. *Swindon and Cheltenham Extension Ry. Co.* (4) Lord Bramwell misapprehended the law. At any rate, what he said is only a dictum.

What is the meaning of extending the Act of 1854 by the Act of 1877? In the first part of s. 1 of the Act of 1877 there

(1) 23 Ch. D. 218.
(2) Ibid. 222.
(3) [1893] 3 Ch. 361, 362.
(4) 9 App. Cas. 808.

is no extension except by the use of the word "intestate." Then the following clause negatives some existing rights, but does not mention next of kin. If the next of kin were entitled to have an incumbrance discharged, that right is not taken away. It is a casus omissus.

[VAUGHAN WILLIAMS L.J. Why should a perverse meaning be imputed to the Legislature?]

A good claim in law, if not provided for by the Acts, must prevail: *In re Cockcroft.* (1) If the next of kin had a right, it must be shewn that it has been taken away. The decision in *In re Kershaw* (2) turned upon the use of the word "legatee" in s. 1 of the Act of 1877, and the words "next of kin" are not there. Here the will directs the executors to pay the testator's debts. He gives what is left (except chattels real) after paying his debts. It is immaterial whether the creditor has a security. The next of kin take the personal estate which is not disposed of, and there is no law which requires them to pay a debt which is charged on the estate which comes to them.

[COZENS-HARDY L.J. Why has it been held that a specific legatee is entitled to have that which is given to him exonerated from the testator's debts? Is it not because the specific thing is given to the legatee? Has that any application to an intestacy?]

It is submitted that the debts ought to be paid out of the fund which the testator has provided for the purpose.

Cur. adv. vult.

March 29. STIRLING L.J. read the judgment of the Court (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.) as follows:—The first point to be dealt with on this appeal is one which was not taken in the Court below. It was contended that the testator's chattels real in England, which formed part of the chattels real in terms excepted from the general bequest of the testator's personal estate contained in his will, have nevertheless fallen into that bequest by reason of the death of

(1) 24 Ch. D. 100. (2) 37 Ch. D. 674.

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the legatee of those chattels real in England under that will—namely, Charles Craufurd Fraser—in the testator's lifetime. In support of that contention *Blight* v. *Hartnoll* (1) was mainly relied on. The law as laid down in that case appears to be that, when in a will property is excepted from a general gift of the testator's personal estate and is afterwards specifically bequeathed, but such bequest fails by lapse or otherwise, then it is to be taken that the object of the testator in making the exception was simply to give the property in question to another; and, that being the sole object, there is no reason why upon the failure of the bequest it should not be held to be included in the residuary gift. If, however, the testator makes no disposition by will of the excepted property, this reasoning does not apply, and the excepted property passes as on an intestacy. If our decision turned on the will alone there would be much to be said in favour of the contention referred to. But the testamentary dispositions of the testator include several subsequent codicils, and in particular one of July 21, 1898, which begins by reciting the death of Charles Craufurd Fraser (the legatee of the chattels real in England) and contains a confirmation of the will as altered by prior codicils. The effect of this is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils: see *Doe* v. *Walker* (2); *In re Champion.* (3) The result in the present case is that the testator has, on the face of the testamentary dispositions existing at his death, excepted the chattels real from the general bequest, and has not really made any bequest of them, the apparent bequest being on the face of the instruments themselves ineffective. In our opinion, therefore, the doctrine of *Blight* v. *Hartnoll* (1) does not apply.

As regards the two points decided by Byrne J., we agree with him. We have nothing to add to the reasons given by him for holding that the rent-charge in question is a chattel

(1) 23 Ch. D. 218.

(2) (1844) 12 M. & W. 591; 67 R. R. 427.

(3) [1893] 1 Ch. 101.

real. As regards the construction of Locke King's Act, 1854, and the amending Acts of 1867 and 1877, we think that these Acts are to be read together. The language of the first part of s. 1 of the Act of 1854, though admitted to be in itself wide enough to extend to all interests in land, was, by reason of the subsequent clauses of the same section being confined to heirs and devisees, held to be limited in its operation to freehold interests: see *Solomon* v. *Solomon* (1); *In re Wormsley's Estate.* (2) By the amending Act of 1877, the Legislature has clearly shewn that this limitation is no longer to operate, and it has been held that the Acts now extend to leaseholds: *In re Kershaw.* (3) It is true that legatees only are spoken of in the Act of 1877, and not next of kin; but, in our opinion, there is in the Act of 1877 enough to shew that the Act of 1854 ought no longer to receive the narrow interpretation placed on it in *Solomon* v. *Solomon* (1) and *In re Wormsley's Estate.* (2) Notwithstanding some difficulties arising from the language of the Act of 1877, we think it is decidedly preferable so to construe the Act of 1854, rather than to hold that the next of kin escape from a liability to which the legatee would have been subject had he survived the testator.

Solicitors: *Rowcliffes, Rawle & Co.; Bompas, Bischoff & Co.; Fox, Trotter & Co.*

(1) 33 L. J. (Ch.) 473. (2) (1876) 4 Ch. D. 665.
(3) 37 Ch. D. 674.

W. L. C.

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[1903 W. 165.]

Trade-mark—Registration—Motion to rectify—Fancy Word—"Tabloid"—Presumption arising from Long User—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64.

Where a trade-mark is impeached after it has been on the register for a great many years, and has been openly and largely used, and there is a doubt as to its validity, the registered proprietor is entitled to the benefit of the doubt.

Prior to 1884 B. & W. manufactured and sold compressed drugs made up into small biconvex discs under the name of "Tablets," and they registered that word as a trade-mark. In 1884 they registered the newly coined word "Tabloid" as a trade-mark, under the Patents, Designs, and Trade Marks Act, 1883, for substances used in pharmacy, and they had since manufactured and sold compressed drugs of the same shape and size under the name of "Tabloids":—

Held, by Byrne J. and by the Court of Appeal, dubitante Stirling L.J., that at the date of its registration the word "Tabloid" was a distinctive fancy word.

THE plaintiff was the sole surviving member of the firm of Burroughs, Wellcome & Co., wholesale manufacturing chemists of London. The defendants carried on business as retail chemists in Manchester and elsewhere in the provinces. The plaintiff, trading as Burroughs, Wellcome & Co., brought this action for an injunction to restrain the defendants from passing off their goods as the plaintiff's, and particularly from selling or offering for sale any such goods under the name "Tabloid" or "Tabloids," and from infringing the plaintiff's trade-marks. The defendants moved to rectify the register by expunging therefrom the several trade-marks alleged to have been infringed, namely, Nos. 36,154, 36,155, 42,378, 42,379, and also the following further trade-marks belonging to the plaintiff, Nos. 225,812, 225,813, 225,814, 225,815, 225,816. The action and the motion came on together, but this case is reported on the motion only.

The facts relating to the motion were as follows.

The plaintiff's firm when they first started business in London in 1878 had the exclusive right to sell in Europe compressed drugs manufactured by John Wyeth & Brother, a Philadelphian firm of chemists, and they sold these drugs under the name of Wyeth's Compressed Tablets. These drugs were in a solid form and of a lenticular or biconvex shape. In 1883 the plaintiff's firm began to manufacture for themselves compressed drugs of a similar size and shape, but they also continued to sell Messrs. Wyeth's drugs until 1888, when the arrangement between the two firms came to an end.

In 1883 they registered the word "Tablets" in a frame in class 3, intending to use it as a trade-mark in respect of compressed drugs issued by them; but, being advised that there was some doubt as to the validity of the word "tablet" or "tablets" as a trade-mark, they coined a new word, "Tabloid," which was not then known in the English language, and on March 14, 1884, they registered this word "Tabloid" under Nos. 36,154 and 36,155 in classes 3 and 42 in respect of chemical substances not included in class 1 used in medicine and pharmacy and preparations of food for human use. On January 27, 1885, they registered the word "Tabloids" in a frame in respect of the same substances. This latter registration was in order to enable them to register in Germany, where the registration of a word would not be granted except in connection with a device and previous registration in England. These registrations had since been renewed and were still in force. Since the date of the first registration of the word "Tabloid" the plaintiff's firm had continuously made and sold compressed drugs of the original shape and size, but they had also made and sold compressed drugs of various other sizes and of differing shapes, chiefly however of a form more or less biconvex, and they had continually sold their compressed drugs in connection with the word "tabloid" or "tabloids." They did not, however, immediately give up the word "tablets," but applied it to a certain class of compressed drugs, and for some short time they used the words "tablets" and "tabloids" in their advertisements simultaneously; but in 1890 they abandoned the use

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of "tablets" as a trade-mark altogether. As their business increased they began to manufacture a great variety of compressed goods besides medicines, such as foodstuffs and chemicals used in various kinds of industries, and on September 12, 1899, they registered the word "Tabloid" under Nos. 225,812, 225,813, 225,814, 225,815, and 225,816 in classes 1, 2, 39, 44, and 48 respectively.

For the first few years after the date of the original registration of the word they used "Tabloid" as a substantive, without inverted commas and without the addition of the words "trade mark," as, for example, "voice tabloids," "tabloids of compressed chlorate of potash"; but in 1889 they began to use the word in inverted commas, and shortly afterwards they added the words "trade mark." Finally, in 1897, they began to use the word in an adjectival sense in conjunction with the words "brand" and "system," e.g., "'Tabloid' brand; Phenacetin," and they continued to use it in this way down to the present time.

Since the date of its original registration the word "Tabloid" had appeared in various medical and other dictionaries as meaning a small troche or lozenge, and as equivalent to "tablet" in this sense, but in every case the plaintiff's firm had remonstrated and had obtained from the publisher an undertaking that the word should not appear in any subsequent edition unless accompanied by a statement that it was a proprietary word. The word had also appeared in recent periodical literature, and especially in *Punch*, and was used in a figurative sense to denote anything compressed into a small form.

The motion came on for hearing before Byrne J. on November 20, 1903.

Neville, K.C., and *Levett, K.C.* (*Moulton, K.C.*, *Sebastian*, and *Kerly* with them), for the plaintiff. The plaintiff's mark, "Tabloid," was registered under the Patents, Designs, and Trade Marks Act, 1883, and at the date of its registration the test was whether it was a fancy word not in common use; but by the Act of 1888 the term "fancy word" was abolished, and

a word was admitted to registration if it was either an invented word or a word having no reference to the character or quality of the goods to which it was to be applied. It is submitted that an invented word must be a fancy word. A fancy word may be either an invented word or a known word which as applied to the goods in question is obviously meaningless. If a man invents a word it can have no meaning until applied to the article for which it is intended to be used, and the fact that it subsequently acquires a meaning from being applied to the article cannot affect the validity of the word as a trade-mark. For example, "Kodak," which has been held to be a good trade-mark, has acquired in the public mind a general meaning as a type of camera: *Kodak, Ld.* v. *London Stereoscopic and Photographic Co., Ld.* (1) *In re Farbenfabriken Application* (the "Somatose" case) (2) is opposed to the contention that an invented word must be a fancy word; but that case is inconsistent with *In re "Bovril" Trade-mark* (3), and is no longer good law. *In re Densham's Trade-marks* (4), in which "Mazawattee" was held to be a good mark under both Acts, marks the turning point in the trend of decisions under the Act of 1883. That was followed by *In re "Bovril" Trade-mark* (3), which shews that a word cannot be invented without being a fancy word, and none the less because in the constitution of the new word the inventor has used a constituent which, when the article to which it is to be applied is known, may be said to be in some sense descriptive.

[BYRNE J. Lopes L.J. holds entirely to the definition of "fancy word" given in the earlier cases as a word "obviously meaningless as applied to the article in question."]

He is there referring to known words. In *Eastman Photographic Materials Co.* v. *Comptroller-General* (the "Solio" case (5)) the House of Lords decided that a word might be good as an invented word although it had reference to the character or quality of the goods, and they overruled *In re Farbenfabriken Application*. (2) That case shews that the real test of validity

(1) (1903) 20 Rep. Pat. Cas. 337.
(2) [1894] 1 Ch. 645.
(3) [1896] 2 Ch. 600.
(4) [1895] 2 Ch. 176.
(5) [1898] A. C. 571.

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is that laid down by Fry L.J. in *In re Dunn's Trade-marks* (1): "Are you enclosing a strip of the great open common of the English language?" If the word is an invented word, it does not matter how it is arrived at so long as it does not interfere with the use of an existing word. Subject to that condition, it was never intended by these Acts to hamper a trader in getting a distinctive name for his goods. If it could be said that "tabloid" interfered with the use of "tablet" there might be much to be said against the plaintiff's claim, but no such case is made out. It will be objected that this word "tabloid" from its formation must mean something in the nature of a table or tablet; but in the latter case the proper form would be not "tabloid," but "tabletoid"; and any reference to "table" has no meaning as indicating form. Further, where a mark has been widely used for twenty years without protest, every intendment ought to be made by the Court in support of the registration: *In re Bass, Ratcliffe & Gretton's Trade-marks*. (2)

A. J. Walter (*J. H. Gray* with him), for the defendants. The sole authority by which the validity of this trade-mark is to be judged is the Act of 1883. It is said that a word which had no existence before is ex necessitate a fancy word, but the authorities are opposed to that contention. Attempts have been made already to monopolise an ordinary English word by adding a common suffix to it, but without success. In *In re Hannay's Trade-mark* (3) it was sought to support a word containing this very suffix "oid," namely, "electroid," as a fancy word, but the Court held that it was bad. *In re Van Duzer's Trade-mark* (4), which is the leading authority upon the construction of the Act of 1883, shews that in order to entitle a word to registration it must be fanciful as regards the article to which it is applied, and must be obviously non-descriptive. "Tabloid" offends against both those tests. It is merely "table" plus "oid," and it suggests something in the nature of a table or tablet. Taking this word in connection with the subject-matter to which it was to be applied, and

(1) (1889) 41 Ch. D. 439, 455.
(2) (1902) 19 Rep. Pat. Cas. 529, 539.
(3) (1889) 7 Rep. Pat. Cas. 46.
(4) (1887) 34 Ch. D. 623.

having regard to the fact that the plaintiff's firm had already registered the word "Tablet" for the same goods, it cannot be doubted that this word at the date of its registration was not a meaningless word. Even under the Act of 1888 the registration could not be supported, for the decision of the House of Lords in *Eastman Photographic Materials Co.* v. *Comptroller-General* (1) shews that a mere variation in the termination of a known word in itself descriptive will not convert that known word into an invented word.

[BYRNE J. referred to *In re "Bovril" Trade-mark.* (2)]

The distinction between that case and the present is that "ril" was not a known suffix. Other cases in which marks have been disallowed under the Act of 1883 are *In re Waterman's Trade-mark* ("Reversi") (3); *Meaby & Co., Ld.* v. *Triticine, Ld.* ("Triticumina") (4); *In re Grossmith's Trade-mark* ("Emollio"). (5) In *J. C. & J. Field, Ld.* v. *Wagel Syndicate, Ld.* (6) Buckley J. held that "Savonol" was an invented word within the Act of 1888, because "ol" was not a known suffix, but he would have rejected "Savonette." This mark was registered for the purpose of being applied to goods previously known as "tablets," and being properly descriptive of those goods it cannot be a distinctive fancy word. "Tabloid" means, and has always meant, a sort of medicinal tablet, and from the moment of its birth it has been so used by the plaintiff's firm themselves. It is an ordinary variant of the word "tablet." This is an attempt on the part of the plaintiff to prevent the proper development of the English language.

Neville, K.C., in reply on the action. The question whether at the date of registration "Tabloid" was a distinctive fancy word is an issue of fact: *In re "Bovril" Trade-mark* (7); and on that issue no previous case can be an authority: *Cellular Clothing Co.* v. *Maxton & Murray.* (8) In ascertaining

(1) [1898] A. C. 571.
(2) [1896] 2 Ch. 600.
(3) (1888) 39 Ch. D. 29.
(4) (1897) 15 Rep. Pat. Cas. 1.
(5) (1889) 6 Rep. Pat. Cas. 180, 183.
(6) (1900) 17 Rep. Pat. Cas. 266.
(7) [1896] 2 Ch. 607, 609.
(8) [1899] A. C. 326, 334.

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whether a word is descriptive, it is not right to take the article which has been used under the trade-mark and compare it with the word, and then see whether it is not possible to spell out a meaning. The meaning must not be got inferentially.

R. J. Parker, for the Comptroller-General.

A. J. Walter, in reply on the motion. The authorities shew that the test is not whether the word was at the date of registration a distinctive fancy word, but whether it was a distinctive fancy word as applied to the particular goods for which it was intended to be used.

Cur. adv. vult.

1903. Dec. 14. BYRNE J., after stating the facts relating to the motion and referring to the registrations of March, 1884, and January, 1885, continued:—The registration was under the Act of 1883, and, having regard to the terms of s. 64, sub-s. 1 (*c*), the question is whether or not the word "tabloid" was a distinctive fancy word not in common use at the date of registration—namely, March 14, 1884. It is important to keep the date in mind in considering the matter, and this was forcibly brought home to me in the present case by the fact that when the word "tabloid" was first mentioned I quite thought it was a common dictionary word in the language long before 1884; but I am satisfied that this was really due to my acquaintance with the word as used in connection with the compressed drugs of the particular shape I have described, which have become so well known since 1884. The words "table" and "tablet" were, of course, well known, and the latter in reference to solid drugs at least as early as the time of Lord Bacon, as appears from the quotation given in Johnson's Dictionary, ed. 1848; and I find also in the Imperial Dictionary (1868): "4. A medicine in a square form. Tablets of arsenic were formerly worn as a preservative against the plague. A solid kind of electuary or confection made of dry ingredients, usually with sugar, and formed into little flat squares; called also lozenge and troche; also applied to anything made up in a flat square shape, as a tablet of soap." The word "tablet" had also been used to denote compressed drugs made up in the

biconvex shape in question by the plaintiff firm in connection with Wyeth's tablets and by some other persons. The plaintiff firm had registered the word "tablet" for the same class, intending to use it as their trade-mark, but, finding that it could not be sustained, Mr. Wellcome set about finding a new word, and invented the word "tabloid." This word was certainly not in common use, for it was unknown before and was used by his firm for the first time. The *"Bovril" Case* (1), before the Court of Appeal, relieves me from a close examination of earlier cases, and gives me a guide in endeavouring to determine whether or not "tabloid" was a fancy word. The earlier leading cases of *In re Van Duzer's Trade-mark* (2) and *In re Leaf's Trade-mark* (3) were cases in which, as pointed out by Lindley L.J. in the *"Bovril" Case* (1), a coined word was not under consideration at all, but ordinary English words. "Where," says Lindley L.J., "you have got a fanciful use of a known word, you must have a word which is obviously non-descriptive." Then he says (4): "But I agree that a word which describes the article to which it is applied will not do. Let us therefore ask ourselves whether 'Bovril' is a descriptive word. To my mind, it is not descriptive, notwithstanding Mr. Bower's very ingenious argument. He tries to make it out to be a descriptive word, not by taking the word, but by taking a little bit of it, and he says that because 'Bov' may have some relation, and does have some relation to 'ox,' therefore 'Bovril' describes—what? I do not see that it describes anything at all." I think I also get this from the *"Bovril" Case* (1), that it is not necessary that the word should be absolutely unsuggestive. The word "Bovril" was suggestive of "ox," but as a whole was held not to be descriptive. The argument in the present case for the applicants was: Here is a word to be dealt with compounded of "table" or "tablet" with a common suffix "oid."—To the last, Mr. Walter, with his accustomed skill, would not pin himself to one or the other. —There were, he says, the words "tabella," "table," "tablet" in common use, and "tabloid" must be taken from part of

(1) [1896] 2 Ch. 600.
(2) 34 Ch. D. 623.
(3) (1887) 34 Ch. D. 623.
(4) [1896] 2 Ch. 606.

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one or other of them, and the rest of the word is made up by adding a common suffix, "oid," meaning "in the form of," or "like," or "allied to," used in a great many English words, and especially in connection with scientific nomenclature, and though part of the root or suggesting word is left out, the word "tabloid" means something like or allied to things denoted by one or other of the old words. On the other hand, it was forcibly urged that the only attribute common to the things denoted by the word "table" and "tablet" is the suggestion of flatness on one side or other, or on both sides, of the object without any notion of convexity. Suppose "tablet" be the word alleged to have the common suffix appended, it is to be noticed that the new word is not "tabletoid," but "tabloid," a possible but not the most obvious formation, while if "table" be the word, though "tabloid" would probably be a natural way of adding the suffix, by analogy to other words constructed in a similar form, the word so constructed would mean allied, not to a "tablet," but to a "table"; but though solid drugs in certain forms were known as "tabellæ" or "tabulæ," there is nothing that I can find to denote convexity or compression in the word. I think the case is near the line; but, treating it as a matter of fact in the particular case, I come to the conclusion that in March, 1884, the word was not "really intelligibly describing the thing sold," which is the way in which Lindley L.J. in the "*Bovril*" *Case* (1) puts the form of direction to the jury. I agree that there is a suggestion or atmosphere of description about the word as then used, but I do not think that it can be said to have been other than a "fancy word" as applied to goods in the class to which it was registered. The motion must therefore be dismissed.

[His Lordship then dealt with the action, and granted an injunction against the defendants in respect of the claim for passing off.]

H. B. H.

C. A. Messrs. Thompson & Capper appealed from this decision so far as it related to the motion to rectify. The appeal came on for hearing on March 25, 1904.

(1) [1896] 2 Ch. 607.

A. J. Walter and *J. H. Gray*, for the appellants. The question is whether the word "tabloid" was at the date of its registration a distinctive fancy word not in common use within s. 64 of the Act of 1883, and for that purpose it is important to see how the word has been used. Messrs. Burroughs, Wellcome & Co. first register the word "tablet" as their trade-mark, and they describe medicines put up by them in a compressed form as tablets; then they register the word "tabloid," and they describe the same goods as tabloids, and for some years they sell "tabloids" and "tablets" side by side. From the first they used "tabloid" descriptively and not distinctively, and they used it in its proper signification to describe a kind of tablet. The public use the word in the same sense, as may be shewn by a reference to dictionaries.

[*Neville, K.C.* It is conceded that the word had never been used until it was invented by the proprietors, and the fact that it has subsequently found its way into dictionaries and other books is irrelevant and not evidence.

VAUGHAN WILLIAMS L.J. Mr. Walter may refer to the dictionaries as part of his argument, but I do not know that I am bound to accept them as expert evidence.]

The dictionaries shew that "oid" is a common termination, "having the form or likeness of": Murray's Oxford Dictionary; and that "tabloid" is derived from "table" and "oid," and is used as equivalent to "tablet" in the sense of "a small troche or lozenge usually administered by the mouth or after solution hypodermically": Century Dictionary (1889); Foster's Encyclopædic Medical Dictionary (1892); Foster's Reference Book of Practical Therapeutics; Chambers's Twentieth Century Dictionary (1901); Standard Dictionary (1895); Latin Grammar of Pharmacy. It is nihil ad rem that the dictionaries at the request of the respondent have added "used as a trade-mark." The word has become part of the current literature, and is used in a manner strictly analogous to the use to which it was first applied. [Counsel referred to recent numbers of *Punch*, the *Tatler*, *Nature*, and the *Daily Mirror*, in which the following expressions occurred: "Opera in Tabloid"; "Tabloid Melodrama"; "Knowledge in tabloid form"; "Tabloid Missives";

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"Modern Art in Tabloid."] The cases under the Act of 1883 shew that to be a fancy word a word must be obviously meaningless as applied to the articles to which it is intended to be applied. It must be neither descriptive nor suggesting description: *In re Van Duzer's Trade-mark* (1); *In re "Bovril" Trade-mark*. (2) Applying the tests there laid down, this mark cannot stand. Further, this word is not an invented word under the Act of 1888. It is invented in the sense that it was never seen before; but it is not invented within the meaning of the term in the Act as defined by *Eastman Photographic Materials Co.* v. *Comptroller-General* (3), because there is not a shadow of invention in it. It is an ordinary word with a common suffix. The Court will not allow any one to claim the exclusive right to the use of a word compounded of a known word and a known suffix, since that is destructive of the proper development of the English language. The word "tabloid" trespasses against the whole reasoning underlying the opinions of the House of Lords; and if it could not have been registered as an invented word under the Act of 1888, ex necessitate it could not be a fancy word under the Act of 1883.

[VAUGHAN WILLIAMS L.J. Lord Herschell in referring to "Satinine" seems to think that it might be an invented word, notwithstanding that it was "satin" plus a termination.]

Buckley J. did not so read that passage. He understood Lord Herschell to mean that "Satinine" might be objectionable because it was not invented: *J. C. & J. Field & Co., Ld.* v. *Wagel Syndicate, Ld.* (4) In *In re Hannay's Trade-mark* (5) "Electroid" was held bad under the Act of 1883, although it was not a dictionary word. "Tabloid" is descriptive, and was used descriptively from the first, and it is, therefore, not distinctive: *Meaby & Co., Ld.* v. *Triticine, Ld.* (6); *In re Grossmith's Trade-mark* (7); *Linoleum Manufacturing Co.* v. *Nairn*. (8) "Distinctive" means "distinguishing a particular person's goods from somebody else's goods—not a quality attributed to

(1) 34 Ch. D. 623.
(2) [1896] 2 Ch. 600.
(3) [1898] A. C. 571.
(4) 17 Rep. Pat. Cas. 266.
(5) 7 Rep. Pat. Cas. 46.
(6) 15 Rep. Pat. Cas. 1, 14.
(7) 6 Rep. Pat. Cas. 180.
(8) (1878) 7 Ch. D. 834.

the particular article": *Perry Davis & Son* v. *Harbord*. (1) This word is not distinctive according to that test. The true test in considering whether the word is a distinctive fancy word is, knowing the article to which the word is to be applied, has the word a descriptive meaning, or does it suggest a descriptive meaning? If so, it is incapable of registration under the Act of 1883. Looking at this word with the knowledge that "tablet" had been used in connection with the goods to which it was intended to be applied, and that the goods were known as being compressed drugs of a biconvex shape and of small size, a jury must have come to the conclusion that the word was descriptive and was not a fancy word.

Moulton, K.C., and *Neville, K.C.* (*Levett, K.C., Sebastian*, and *Kerly* with them), for the respondent. It is said that if a mark is descriptive it cannot be distinctive; but it is no objection to a trade-mark that the owner has not used it on all his goods. If he uses the mark on some only of his goods and he meets with great success the trade-mark will come to denote not only the origin but the particular kind of goods: *Kodak, Ld.* v. *London Stereoscopic and Photographic Co., Ld.* (2); *In re Chesebrough's Trade-mark "Vaseline."* (3) If it could be shewn that Messrs. Burroughs, Wellcome & Co. had ever applied their mark to goods not coming from them the appellants' argument would be good, because that would be telling a lie as to origin; but this word "tabloid" is still indicative of origin, although it is also used as denoting a particular class of goods of that origin. The question is whether at the date of its registration in 1884 the word "tabloid" was a distinctive fancy word not in common use. That it was not in common use is conceded, because it had never been used by anybody; and if it had never been used at all, then by adoption by Messrs. Burroughs, Wellcome & Co. it could be made a distinctive word.

[COZENS-HARDY L.J. referred to *In re "Uneeda" Trade-mark*. (4)]

That was held bad for another reason, namely, because it

(1) (1890) 15 App. Cas. 316, 320.
(2) 20 Rep. Pat. Cas. 337.
(3) [1902] 2 Ch. 1.
(4) [1901] 1 Ch. 550.

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was a mere misspelling of known words. If the word "tabloid" had been put to a jury in 1884 they would not have known what it meant. That goes a long way towards saying that it is a fancy word; and, if a word at the date of registration is a fancy word, and has never been used before, the term "distinctive" does not add much to the definition in s. 64. The doctrine of *In re Van Duzer's Trade-mark* (1) has no application to a new word: *In re "Bovril" Trade-mark*. (2)

[COZENS-HARDY L.J. Does not your argument involve that *Meaby & Co., Ld.* v. *Triticine, Ld.* (3), and *In re Grossmith's Trade-mark* (4) were wrongly decided?]

No doubt after the decision of the House of Lords in *Eastman Photographic Materials Co.* v. *Comptroller-General* (5) the trade-marks "Triticumina" and "Emollio" would have been supported. The test is, would "tabloids" have carried to the ordinary person a meaning in 1884?

[COZENS-HARDY L.J. You must couple with that the evidence of the mode in which you use the word at or about the time—"Tabloids of" so and so.]

If that meant Burroughs, Wellcome & Co.'s tabloids, that user would not prejudice their right. If a proprietor uses a trade-mark not as descriptive independently of origin, but as descriptive of his goods of a particular type, there is nothing in that disloyal to the idea of a trade-mark. Such a use could not retroact to shew that the word was an improper word. The test of legitimate user is that the indication of origin should not be absent. Subject to that, it is no objection that the owner uses the word also descriptively. It is said that this word means "like a table" or "like a tablet"; but which is it like? The only thing common to "table" and "tablet" is flatness, and that does not apply to these drugs, which are biconvex. Therefore, even taking the articles in question, the endeavour to extract a meaning out of the word necessarily fails. No doubt, after twenty years, people have come to associate the name with the article they have bought under

(1) 34 Ch. D. 623.
(2) [1896] 2 Ch. 600.
(3) 15 Rep. Pat. Cas. 1.
(4) 6 Rep. Pat. Cas. 180.
(5) [1898] A. C. 571.

that name, and in that sense it has become descriptive; but that is due to the familiarity which has grown up through Messrs. Burroughs, Wellcome & Co.'s success. An argument was attempted to be founded on the use by Messrs. Burroughs & Wellcome of the word "Tablet"; but so far as the word had any meaning in the medical world in 1884, it meant any kind of solid dry medicine made up in little flat squares: Ogilvie's Dictionary, 1883; Johnson's Dictionary, 1870; Chambers's Dictionary, 1872. Where a mark has been openly used for a great many years, if there is any doubt about the validity of the mark, the benefit of the doubt ought to be given to the proprietor: *In re Chesebrough's Trade-mark "Vaseline"* (1); *In re Bass, Ratcliffe & Gretton's Trade-marks.* (2)

R. J. Parker, for the Comptroller-General.

A. J. Walter, in reply.

VAUGHAN WILLIAMS L.J. This, in a sense, is rather a difficult case—not in the sense, however, that the law is difficult. I do not think there is much difficulty in point of law. I think one may say generally of the law that it is now defined by *Van Duzer's Case* (3), as modified by the *"Bovril" Case* (4); and I do not think that the law thus defined is very difficult to ascertain. But this case is a difficult case, because it is really a question of fact which we have to decide here; and that question of fact is: What did the word "tabloid" convey to those who heard it at the date of the registration in 1884? The difficulty of answering that question is very considerably increased, of course, by the lapse of time. We have had quoted to us dictionaries and literary productions which have been published during the whole period between 1884 and the present time, and I do not think really that that sort of evidence has assisted us much. In fact, I go a step further; I think that that sort of evidence has had a direct tendency to make our task more difficult, because it is difficult to eradicate altogether from one's mind the statements which have been made about the user of this word "tabloid," and its meaning

(1) [1902] 2 Ch. 1.
(2) 19 Rep. Pat. Cas. 529, 539.
(3) 34 Ch. D. 623.
(4) [1896] 2 Ch. 600.

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at the material date, and everybody agrees that that is the date of the registration. But this is not the first case in which the Courts have had to deal with that sort of difficulty. I think, as appears from the judgments of Stirling and Cozens-Hardy L.JJ. in the *Chesebrough Case* (1), that the Court, when it has had to deal with a question of fact of this sort long after the date of the registration, has laid down a rule that in such a case the presumption ought to be in favour of the persons who have had that registered trade-mark for that length of time; and the onus of proof as to what was the user of the word, and what it was understood as conveying at the date of registration, ought to be thrown upon the persons who seek, after such a lapse of time, to say that the trade-mark ought not to have been registered. But I should be very sorry if it was supposed from what I am saying that I in any way meant to suggest that this sort of presumption in favour of the trade-mark which has been registered for such a period ought to be allowed to overmaster plain evidence shewing that the trade-mark, having regard to the state of things at the date of the registration, ought not to have been registered. I take it, if you had something registered as a trade-mark which the evidence shewed clearly ought not to have been registered at the date when it was, that no presumption would justify us in keeping such a trade-mark on the register. Now I have to ask myself here—What was the character of this trade-mark in 1884? What did the word "tabloid" convey at the moment when it was registered? I will say shortly, to begin with, that I think this word "tabloid" was, at the time of this registration, a distinctive word suggesting the source or origin of the goods which were covered or intended to be covered by it; and I think, further, that at this date the word "tabloid" was not a descriptive word. I think that as the word was understood at that time it really conveyed to the hearers no peculiar quality of these goods which were offered to the public. I think that the word "tabloid" may properly be described at that time as being a fancy word. I do not think myself that, having regard to the judgment in

(1) [1902] 2 Ch. 1.

the "*Bovril*" *Case* (1), it could be said that a word is to be treated as a descriptive word because it might suggest some idea to the hearer. It seems to me that the trade-mark which was under discussion in the "*Bovril*" *Case* (1) proves the contrary. It is perfectly impossible to say that the word "Bovril," used in respect of an extract of meat, did not suggest beef, and an ox, as the materials from which the extract was made. But the mere fact that the word "Bovril" did contain such a suggestion is, to my mind, inconsistent with the idea that the fancy word must be absolutely unsuggestive. It must not be descriptive, but it need not be absolutely unsuggestive. Speaking of this, I should like to add that it is not to the interest of any community to deal with any subject-matter which is regulated by statute law so as to make the rule of law deduced from the statute inconsistent with the practice of mankind. Nobody supposes that when you are going to sit down and choose a fancy name you ask some one to make a selection at haphazard from a dictionary of a number of words, and that you then put them into a bag and dip your hand in and leave it to chance what word it is that you select, and use that word, however foreign it may be to the subject-matter to which you propose to apply your trade-mark. The real fact of the matter is that when a man sits down to choose his trade-mark, his mind will naturally run on words that are more or less cognate to the articles with reference to which the trade-mark is proposed to be registered. His next care is that the cognate word that he so chooses shall not be such that it really describes the quality or the form or the purpose of the article to which the trade-mark is meant to apply. When one is dealing with this question of whether a word is descriptive, I think one must always bear in mind that for a word really to be descriptive it must describe something which is material to the composition, i.e., the quality, form, or purpose of the article to which the trade-mark is intended to apply. If it is not, I do not think that one ought easily to arrive at the conclusion that the word is descriptive because it in some way or other might suggest, or even might more or less

(1) [1896] 2 Ch. 600.

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describe, the particular style in which the person registering has been in the habit of making up his goods, although, of course, that is always a course which must be adopted with great care, because he must be careful never to violate that rule which one has to apply in respect to trade-marks—namely, that you must not adopt as your trade-mark any word whatsoever which would deprive the public of the full and free user of that word when it is a known word, and especially when it is a known word in a particular trade. But, subject to those observations, I say, not only is this word distinctive, but in my opinion it is not a descriptive word. Now I am not forgetting that which Mr. Walter and Mr. Gray pressed on us very much. They said that the present case was distinguishable from the "*Bovril*" *Case* (1) because "oid" was a known termination of English words, and "ril," which was the final syllable of "Bovril," was not; and they, as I understood, argued this, that although in "Bovril" you had got a word which suggested it might be "ox" or "beef" as the substance out of which the soup was made, that did not matter, as the word was, strictly speaking, a fancy word, not being a word in the English language at all. Now I want to say with reference to that, that according to my view this word "tabloid" was, in substance, an unknown word at the moment when Messrs. Burroughs & Wellcome adopted it. It is quite true that you could find a good many words which were properly terminated with the suffix "oid," and which were familiarly used by English-speaking people; but in the main I think that those words will be found not to be words of English origin. I think they were words which did not at all set one's teeth on edge when one heard them, as "tabloid" rather does mine. They were words like "trapezoid," "aneroid," and other words in which the commencing part as well as the suffix was of Greek origin. But I doubt very much whether "oid" had then become, as it has become now, a recognised termination of English words. Be that how it may, I do not think that if you took the average Englishman in 1884 the word "tabloid" in respect to these medicines would have

(1) [1896] 2 Ch. 600.

conveyed anything at all to his mind. And even at the present moment there seems to be a great difficulty in saying what it is which the word "tabloid" is supposed to convey. Certainly, if you take the meaning of the word "table," or "tablet," it does not suggest, to my mind, anything of the form of these tabloids which were produced and sold by Messrs. Burroughs & Wellcome. But I say, as a juryman, that this is my conclusion in fact, and I cannot express that conclusion in better words than those in which it is expressed by Byrne J. He says: "I think the case is near the line; but, treating it as a matter of fact in the particular case, I come to the conclusion that in March, 1884, the word was not 'really intelligibly describing the thing sold,' which is the way in which Lindley L.J. in the '*Bovril*' *Case* (1) puts the form of direction to the jury." Really I should have preferred to express my judgment in this shape—that I entirely agreed with the judgment of Byrne J. I think that this word is a fancy word in that it was a coined word; I think that it did not describe anything intelligibly in 1884 to those who heard it. I agree that you cannot say that the word is absolutely unsuggestive; but any suggestion which you derive from it is a very inaccurate suggestion as to shape, and an inaccurate suggestion as to a matter which was in no sense essential, or of any practical materiality in the articles to which it was applied. There is only one other matter upon which I propose to make any observation, and that is on the part of the argument which was based upon the previous user of the word "tablet." I think that the word "tablet," although that of course was an accepted English word, did not really convey anything material about the article to which the trade-mark was to be applied. Then can it be said that because Messrs. Burroughs & Wellcome registered the word "tabloid" two years afterwards their previous user of the word "tablet" converted that which but for that previous user would have been an invented word, a coined fancy word, into a word which by that time by their previous user of the word "tablet" had acquired a meaning? I do not think so. Of course this is really only part of the

(1) [1896] 2 Ch. 600, 607.

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matter that one has to consider as a matter of fact; and I am of opinion, notwithstanding that previous user of the word "tablet," that "tabloid," when first adopted as a trade-mark by Messrs. Burroughs & Wellcome, did not intelligibly describe anything. Under these circumstances I have only thought it right to mention what was said about the word "tablet," and the user of it as a trade-mark, to shew that in arriving at the conclusion of fact which I have arrived at I have not left that argument out of consideration. In my opinion, the judgment of Byrne J. is quite right.

STIRLING L.J. In this case the validity of the registration of the words "tabloid" and "tabloids" under the Trade Marks Act of 1883, as applied to substances used in medicine and pharmacy, is called in question. The registration is justified upon the ground that at the date at which it took place—namely, 1884—the word "tabloid" was a distinctive fancy word not in common use. I think there is no contest that the word was not in common use in the year 1884. It appears to have been a word coined at that date, and if it was not in common use at that time it might fairly be taken to be distinctive. Therefore I do not enter into any discussion as to those words "distinctive" and "not in common use." The real contest in this case is whether these words were in 1884 "a fancy word or words," or not. Now, the meaning of those words, "fancy word or words," as used in the Act of 1883, has been considered by the Court of Appeal in two cases—namely, in *Van Duzer's Case* (1) and in the case of *In re "Bovril" Trade-mark* (2), and, of course, by those decisions we are bound. The first of those cases—namely, *Van Duzer's Case* (1), with which was heard another case called *Leaf's Case* (3)—related to the application, in the way of a trade-mark, of the word "Melrose," *Leaf's Case* (3) relating to the word "Electric," words which were not new at the time of their being so applied, and some law was laid down with regard to the meaning to be attributed to the words "fancy word or

(1) 34 Ch. D. 623. (2) [1896] 2 Ch. 600.
(3) 34 Ch. D. 623.

words" which was supposed to extend to all cases; but that question came to be reconsidered in the "*Bovril*" *Case* (1), in which the Court had to deal with a word which, like the word "tabloid," was a new one at the date of its registration. Now it appears to me, as I think it appeared also to Byrne J., that the proper course here is to deal with the present question relating to the word "tabloid" in the way in which the Court of Appeal dealt with the word "Bovril" in that case. Now what does Lindley L.J., who gave the leading judgment in that case, say is the proper thing for him to do? He says: "It would be altogether wrong for us to take the Act of 1883 and substitute for the words 'fancy word' 'a non-descriptive word.' That is not the language of the Legislature. But I agree that a word which describes the article to which it is applied will not do. Let us therefore ask ourselves whether 'Bovril' is a descriptive word." Then he says: "To my mind, it is not descriptive, notwithstanding Mr. Bower's very ingenious argument. He tries to make it out to be a descriptive word, not by taking the word, but by taking a little bit of it, and he says that because 'Bov' may have some relation, and does have some relation to 'ox,' therefore 'Bovril' describes —what? I do not see that it describes anything at all." Then later he says: "I think it is eminently and purely a question of fact. Now, I ask myself this: Supposing that a jury were asked to say whether, on November 2, 1886, 'Bovril' was a fancy word not in common use, and supposing they said, upon a direction from the judge, which I think it would be the duty of the judge to give, that if they were of opinion that it really intelligibly described the thing sold it would not do, could they, with that direction, reasonably say it was not a fancy word not in common use? I do not think they could." Now I think that that is the process which we ought to apply to this word "tabloid" which we have to consider here. Byrne J. has taken that course, and his answer to the question has been already read, therefore I do not repeat it. Speaking for myself, I can only say that I entertain greater doubt than he seems to have entertained, or than is felt by my brother, as

(1) [1896] 2 Ch. 600, 606, 607.

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to the result of the evidence in this case. Byrne J. said that there was a suggestion or atmosphere of description about the word as used, but he came to the conclusion that it could not be said to have been other than a fancy word. I should like to state the difficulty which occurs to me. The question which we have to consider is whether it was a fancy word when it was invented in the year 1884. Now in dealing with that question we must not treat it in an abstract manner, but see what were the circumstances which preceded the introduction of the word. We start with this—that before 1884 the word "tablet" was well known in connection with medicines. I find in the Imperial Dictionary, published in the year 1874, that is ten years before, this meaning: "A medicine in a square form. Tablets of arsenic were formerly worn as a preservative against the plague. A solid kind of electuary or confection made of dry ingredients, usually with sugar and formed into little flat squares; called also lozenge and troche; also applied to anything made up in a flat square shape, as a tablet of soap." Further, we know this, that for some years previous to 1884 this very firm of Burroughs & Wellcome had found that a convenient and useful mode of making up medicines was to make them up in the form of what they called tablets, which were, speaking broadly, small quantities of the medicine of somewhat globular shape; and they had sold medicines so made up under the name of "tablets," and in fact they had registered the word "tablet" as their trade-mark in connection with these preparations. They appear to have been advised that "tablet" was a word the registration of which could not be maintained; and they applied themselves to see whether they could not find another word which could be used apparently for the same purpose as the word "tablet" had been used before. They fixed on the word "tabloid." What does "tabloid" suggest? It suggests a connection either with "table" or "tablet." It is registered as applied to preparations for use in medicine and pharmacy. We have not heard at all of the use of the word "table" in connection with medicine or pharmacy; but, as I have already stated, we have heard of the use of "tablet," and it seems to me that it

might be inferred from the evidence which we have in this case that the word "tabloid" had a descriptive meaning. The termination "oid" is one which is not uncommon in words which are used in the English language, and it means of a shape or kind similar to that which is denoted by the initial part of the word to which "oid" is affixed. I confess I feel a great deal of hesitation as to whether the true inference of fact to be drawn in this case is not that "tabloid" meant, as applied to a medicine, a preparation made up, not precisely in the same form as that which had hitherto been designated under the name "tablet," but in a somewhat similar form, and that it is descriptive in that sense. But Byrne J. has taken a different view, and my brethren both take the same view as Byrne J.; and I think in deciding this question it has to be borne in mind that, as laid down in the *Chesebrough Case* (1), when a trade-mark is impeached after so long a distance of time as occurs in this case, it is fair that if any doubt exists the person who has had his trade-mark on the register for that long period, and has openly and largely made use of it, should have the benefit of the doubt. For these reasons I am not prepared to differ from Byrne J. or my brethren, and I therefore think that the appeal fails.

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COZENS-HARDY L.J. I feel to a large extent the difficulties which have pressed on Stirling L.J. If this case had fallen to be decided ten years ago, I cannot doubt that the mark would have been taken off the register as not being "a distinctive fancy word not in common use." But the swing of the judicial pendulum has been very great, and the extreme point of that swing is to be found, I think, in the present case. The real difficulty is in putting a meaning on the word "fancy." It certainly means something more than new or newly coined; it certainly means something more than "invented." The real difficulty is to say what more is involved in the use of the word "fancy." The present case is extremely near the line; but reading, as I have done very carefully, the last decision of the Court of Appeal, namely, the "*Bovril*" *Case* (2),

(1) [1902] 2 Ch. 1. (2) [1896] 2 Ch. 600.

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by which, in so far as it may qualify earlier cases, we are bound, I am driven to the conclusion that, although this word is suggestive of description, it is not necessary that the word should be absolutely unsuggestive of it; and I cannot find here in the present case anything sufficiently near to description to enable me to distinguish it from the "*Bovril*" *Case.* (1) As a juryman, I am not able to say that "tabloid" "really intelligibly described anything," to use the words of Lindley L.J., or that it is otherwise than "non-descriptive and meaningless as applied to the articles in question," to use the words of Lopes L.J. Under these circumstances I cannot say that Byrne J. was wrong in declining to remove from the register a mark which had been on for nearly twenty years; and I agree, therefore, that the appeal must be dismissed.

Solicitors for plaintiff: *Markby, Stewart & Co.*

Solicitors for defendants: *Sharpe, Parker & Co., for Alsop, Stevens, Harvey & Crooks, Liverpool.*

Solicitor for Comptroller-General: *Solicitor to the Treasury.*

(1) [1896] 2 Ch. 600.

H. B. H.

LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* MAYOR OF THE CITY OF WESTMINSTER.

C. A. 1904

March 4, 7, 8.

[1901 L. 260.]

Local Government—Public Health—Sanitary Authority—Power to provide Sanitary Conveniences—Subsoil of Road—Vesting in Sanitary Authority—Misuse of Statutory Powers—Injunction—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 44.

By the Public Health (London) Act, 1891, s. 44, sanitary authorities have power to provide public sanitary conveniences in situations where they deem the same to be required, and to defray the expense of providing the same, and of any damage occasioned to any person by the construction thereof. And for the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building, is vested in the sanitary authority.

A sanitary authority constructed in the middle of a street (partly in the subsoil belonging to the plaintiffs as owners of a house at the side of the street) underground conveniences, with underground approaches or subways having an entrance on each side of the street by means of a staircase. The subways could be used for the purpose of passage from one side of the street to the other, and were of greater width than was necessary for the purpose of approaches to the conveniences. The sanitary authority had no statutory power to construct subways:—

Held, on the evidence (differing in this respect from Joyce J.), that the primary object of the sanitary authority in constructing the approaches was that they might be used as a subway for passage from one side of the street to the other, and that consequently they had exceeded their statutory powers and ought to be restrained by injunction.

Decision of Joyce J., [1902] 1 Ch. 269, reversed.

Per Vaughan Williams L.J.: *Semble*, that s. 44 does not vest in the sanitary authority so much of the subsoil as could possibly be used for the purpose mentioned, but that if the sanitary authority do in fact use the subsoil for that purpose the subsoil so used vests in them.

Semble, also, that the sanitary authority have not to pay compensation to the landowner for the subsoil which they use.

Appeal by the plaintiffs from the decision of Joyce J. (1), where the facts are fully stated.

The plaintiffs were the owners and occupiers of freehold land and houses in Parliament Street and Bridge Street, West-

(1) [1902] 1 Ch. 269.

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minster, comprising a block of buildings at the north-east corner formed by the junction of Parliament Street and Bridge Street.

In 1900 the defendants, who were the highway and sanitary authority for the district, purporting to act under the powers conferred on them by s. 44 of the Public Health (London) Act, 1891, constructed beneath the middle of Parliament Street, opposite to the plaintiffs' premises, underground public lavatories and sanitary conveniences with approaches thereto by means of subways from either side of the street, the entrance to each subway being by means of a staircase placed at or near the edge of the foot-pavement adjoining the roadway. One of these staircases was placed opposite to the doorway of the plaintiffs' premises. It extended for a distance of 33 feet along the footway, and was fenced off from it and from the roadway by an iron railing. It was constructed chiefly in the roadway, but to the extent of 2 ft. 9 in. it encroached upon the footway. The wall at the side of the staircase nearest to the plaintiffs' premises was built up close to the wall of a vault belonging to the plaintiffs underneath the footway. The iron railing on the footway was placed upon stone slabs which to the extent of a few inches were vertically over the wall of the plaintiffs' vault.

The vestry, the predecessors of the defendant corporation, had considered schemes for the construction of sanitary conveniences in the same neighbourhood, and had proposed to place them in a position connected with a subway which they hoped would be constructed by the First Commissioner of Works. This plan was not carried out, and ultimately the defendants, who succeeded the vestry as the sanitary authority, constructed the conveniences and subways as above stated.

The plaintiffs alleged that the defendants had no power under the Act of 1891 or otherwise to construct a subway; and that, inasmuch as the subsoil of the street was vested in the plaintiffs ad medium filum viæ, the making of the subway constituted a trespass on their property; and that, even if for the purpose of making the conveniences the subsoil of the roadway was vested in the defendants and not in the plaintiffs,

the subsoil of the footway was not so vested, and that to the extent to which the staircase was constructed in the subsoil of the footway it was a trespass; and further that the erection of part of the staircase over the wall of the plaintiffs' vault constituted a trespass. The plaintiffs also alleged that by erecting the staircase and railing opposite to the entrance to their premises the defendants had obstructed the highway to the damage of the plaintiffs, in particular by obstructing and interfering with their access to the highway from their premises.

The plaintiffs claimed (1.) an injunction to restrain the defendants from continuing to trespass by permitting the subway, staircase, and railings to remain on the plaintiffs' land; (2.) alternatively, an injunction to restrain the continued obstruction of the highway; and (3.) damages.

Joyce J. came to the conclusion that the primary object of the defendants was the construction of the conveniences with the requisite means of approach thereto, and that, this being so, the fact that the approaches might be used for the purpose of crossing the street independently of the conveniences did not constitute the works a subway which the defendants had no power to construct. But he held that so far as the works encroached upon the subsoil of the footway which was vested in the plaintiffs, and did not under s. 44 vest in the defendants, there was a trespass by the defendants. And a mandatory injunction was granted for the removal of that part of the staircase.

The plaintiffs appealed.

The hearing of the appeal was delayed by negotiations between the parties for a compromise, which however proved abortive.

Younger, K.C., *Montague Shearman K.C.*, and *Eustace Hills*, for the plaintiffs. Sect. 44 (1) of the Public Health (London)

(1) By s. 44, "(1.) Every sanitary authority may provide and maintain public lavatories and ashpits and public sanitary conveniences other than privies, in situations where they deem the same to be required, and may supply such lavatories and sanitary conveniences with water, and may defray the expense of providing such lavatories, ashpits, and sanitary

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Act, 1891, on which the defendants rely, vests in them only the soil of the roadway, not that of the footway. The soil of the footway belongs to the plaintiffs as the adjoining owners; and, therefore, as the defendants are exceeding their statutory powers by using it for purposes other than a footway, they are at any rate to that extent trespassers: *Harrison* v. *Duke of Rutland*. (1) Moreover, s. 44 confers on the public authority no power to make a subway, but only to make "public lavatories and conveniences."

[STIRLING L.J. referred to *Stockton and Darlington Ry. Co.* v. *Brown* (2);

COZENS-HARDY L.J. to *Dodd* v. *Salisbury and Yeovil Ry. Co.* (3); and

VAUGHAN WILLIAMS L.J. to *London, Brighton and South Coast Ry. Co.* v. *Truman*. (4)]

Nor have the defendants any other statutory power to construct a subway. It is said that this subway is only constructed as an approach to the conveniences, and that a power to construct proper approaches must be implied. That may be admitted; but it is contended that it is clear from the defendants' minutes and from the correspondence that their real object was to construct the subway, and then to place the conveniences near it with entrances and exits opening into the subway. The approaches have been made wider than was necessary, in order that they might be used as a subway. The defendants have, therefore, exceeded their statutory powers and should be restrained by injunction.

Hughes, K.C., and *Dighton Pollock*, for the defendants. It is submitted that the situation of the approaches, as well as the position of the conveniences, is a matter within the

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conveniences, and of any damage occasioned to any person by the erection or construction thereof, and the expense of keeping the same in good order, as if they were expenses of sewerage.

"(2.) For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority."

(1) [1893] 1 Q. B. 142.
(2) (1860) 9 H. L. C. 246.
(3) (1859) 1 Giff. 158.
(4) (1885) 11 App. Cas. 45.

discretion of the sanitary authority. They are not bound to select the shortest way. They are entitled and indeed bound to consider what is the most convenient mode of approach. They had power to take land, and they had in mind a purpose within their statutory powers. Can they be restrained from taking the land because they had also in mind another purpose which may not have been within their powers?

[VAUGHAN WILLIAMS L.J. Suppose they took a large piece of land in order to construct a subway as well as a convenience?]

It may be admitted that they could not do that, but if they took no more land than was reasonably required for the convenience and its approaches, there could be no objection on the ground that they also intended that the approaches should be used as a subway. That local authorities and companies have a large discretion in the exercise of their statutory powers is shewn by such cases as *London, Brighton and South Coast Ry. Co.* v. *Truman* (1); *Wilkinson* v. *Hull, &c., Railway and Dock Co.* (2), *Lewis* v. *Weston-super-Mare Local Board.* (3) The local authority alone can properly decide what is the most convenient mode of access. The plaintiffs are asking the Court to infer that their real object was to construct a subway, but it is submitted that there is no ground for such an inference. It is said that the subway is unnecessarily wide as an approach to the convenience; but if the defendants have trespassed to a small extent, the proper remedy would be damages, not an injunction.

Younger, K.C., in reply. The Act empowers the defendants to take private property for a specific purpose, but does not provide any compensation for the owner. The subsoil is by the Act vested in the defendants for the purpose of constructing conveniences, not a subway: *Tunbridge Wells Corporation* v. *Baird.* (4) The word "damage" in s. 44 does not include compensation for the property which is taken; it may apply to damage done to adjoining property which is not

(1) 11 App. Cas. 45.
(2) (1882) 20 Ch. D. 323.
(3) (1888) 40 Ch. D. 55.
(4) [1896] A. C. 434.

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taken. If the defendants required the subsoil for a purpose not authorized by the Act, they had no powers to take it except by agreement. The defendants are really trespassers on the subsoil which belongs to the plaintiffs, and on this ground the plaintiffs are entitled to an injunction which should not be limited, as Joyce J. has limited it, to the subsoil of the footway: *Goodson* v. *Richardson*. (1)

[VAUGHAN WILLIAMS L.J. referred to *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co.* (2)]

As an "approach" to the conveniences the subway is of unreasonable dimensions. It is plain that the defendants had in their mind the construction of a system of subways from which access to the conveniences should be obtained. At first the plan was that the subways should be constructed by the Board of Works, and when the defendants found that that could not be done they determined to construct a subway themselves. The defendants have purported to exercise their compulsory powers for an unauthorized collateral purpose and ought to be restrained from so doing: *Dodd* v. *Salisbury and Yeovil Ry. Co.* (3)

VAUGHAN WILLIAMS L.J. So far as the objects of the Westminster Corporation and of the vestry, their predecessors, are concerned, I have a good deal of sympathy with them, and I cannot doubt that they desired to do that which might be best for the public. Of their good faith, in that sense of the term, I have not the slightest doubt. Moreover, I think they rather drifted into the position which they ultimately took up than deliberately adopted it. Their first object was to provide for the comfort and convenience of strangers visiting this part of the metropolis somewhere near Westminster Abbey or the Houses of Parliament. They could not do this without the consent of some other public authorities, which they were unable to obtain. Then it seems to have occurred to them that they might provide this accommodation at some point

(1) (1874) L. R. 9 Ch. 221. (2) [1899] 1 Ch. 474.
(3) 1 Giff. 158.

more to the north, and that, inasmuch as a number of carriage ways converge in that direction, visitors coming from the Abbey or the Houses of Parliament might get there by means of a subway. Then it seems to have been thought that, if they had a subway there, it would be as well to have a system of subways. When they came to deal with this matter they found that there was great difficulty in arranging for it, and they then appear to have given up the notion of constructing conveniences in Victoria Street, or in that neighbourhood, and to have thought that a good place for the conveniences would be at the southern end of Parliament Street. Then it occurred to them that it would be a good plan to place the conveniences close to a subway, and get some other public authority, such as the First Commissioner of Works, to make the subway, and then themselves to construct conveniences having an entrance from and an exit into the subway. [His Lordship referred to some of the minutes of the vestry, and continued:—]

At first the vestry had no notion of making the subway themselves, or of doing anything but availing themselves of the subway when it should have been constructed by the First Commissioner of Works, as they anticipated it would be, as a mode of entrance into and exit from the conveniences. But I think it is clear that eventually the corporation determined themselves to make the subway from which the conveniences were to be approached. The evidence, to my mind, shews conclusively that this is the true view. Now the powers of the sanitary authority are conferred by s. 44 of the Act of 1891. [His Lordship read sub-ss. 1 and 2 of s. 44, and continued:—] My view of sub-s. 2 is that it is not intended to vest in the sanitary authority immediately so much of the subsoil as could possibly be used for the purpose mentioned, but that the meaning is that if the sanitary authority do in fact use the subsoil for this purpose, then ipso facto the subsoil so used shall vest in them. If that is the right view, it seems to me to negative altogether the notion that the sanitary authority are to acquire the land and pay compensation for it in any shape. If that is so, I do not see how the words "may defray the expense of . . . . any damage occasioned to any

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person by the erection or construction thereof," could possibly cover a money payment for the vesting of the land in the sanitary authority. That is of some importance, although in the view which I take of this case it is not essential to determine the point now. But this view of the construction of the section might be of importance if one had to decide whether the sanitary authority were or were not intended to be the judges of what land and how much should be taken, for when the House of Lords had to deal with a similar question in *Stockton and Darlington Ry. Co.* v. *Brown* (1) Lord Cranworth said this: "Some general propositions admit of no doubt. In the first place, I think it clear that when the Legislature authorizes railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands: provided only that they take them bonâ fide with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose. This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of the undertaking. In such cases the Legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers." Assuming it to be an essential part of Lord Cranworth's definition of the occasions on which the company, or other authority who are taking the land, have power to decide to what extent they will take it, that adequate compensation is secured to the landowner for the taking of his land, I am not sure that is true in the present case, because, for the reasons which I have already given, I feel great doubt whether the words of s. 44 relating to damage do secure adequate compensation to the landowner. But it is

(1) 9 H. L. C. 246, 256.

not necessary to decide that question now, for, in my judgment, it is not true that the defendant corporation have taken this land with the object of using it for the purposes authorized by the Legislature. If the judgment of Lord Campbell in *Stockton and Darlington Ry. Co.* v. *Brown* (1) is read, it will be seen that both he and Lord Cranworth affirm in the clearest possible manner that if a company or other authority purporting to acquire land under the powers of an Act of Parliament is not acquiring it for the purposes mentioned in the Act, but for other and different purposes, the duty of the Court is to restrain the authority from so doing. Lord Campbell said (2): "If it had been proved that the company was acting malâ fide, and trying under the powers of an Act of Parliament to get possession of lands of Brown, which were to be applied to other and different purposes, I think the Court would have been justified in interfering by injunction." And Lord Cranworth said precisely the same thing.

Lord Campbell used the words "malâ fide." Joyce J. said that he could not find on the evidence in this case that either the corporation or the vestry had acted otherwise than bonâ fide. But when Lord Campbell said "was acting malâ fide, and trying under the powers of the Act of Parliament to get possession of lands which were to be applied to other and different purposes" than those authorized by the Act, I think he was merely explaining what he meant by mala fides. You are acting malâ fide if you are seeking to acquire land for a purpose not authorized by the Act, and in such a case it is right to restrain the persons who are misapplying the powers given by an Act.

Now, as I have already said, I think that the present defendants and their predecessors did acquire this land for purposes not justified by the Act. It really was hardly denied during the argument that the defendants did construct this approach of greater width than would be required merely for an approach to sanitary conveniences, but which was suitable for a subway. And it was hardly denied that they did so with the very purpose that the subway might be used as a thoroughfare.

(1) 9 H. L. C. 246. (2) 9 H. L. C. 254.

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The corporation have no parliamentary power to acquire land for the purpose of making a subway, and under these circumstances it seems to me that they ought to be restrained. [His Lordship then referred to some correspondence as shewing the object and purpose of the vestry and the corporation, and continued:—]

In the face of these letters it cannot be wondered at that there was considerable hesitation in arguing that the object and purpose which the corporation had in view here was not the construction of a subway. It was contended that the Act justified the taking of the subsoil for the purpose of making approaches to the sanitary conveniences. I will assume that the Act does justify that. It only justifies it in a case in which the making of the approach where it is made is rendered necessary by the conditions of access to and egress from the conveniences. But how can that be said in the present case, when the very letter which I have read tells us that admission to the conveniences which will be accessible from the subway could otherwise have been provided from the refuges above? If that be so, it is not true that these subways have been in fact constructed as approaches to the sanitary conveniences. It is merely this, that, the subway having been constructed by the corporation, they supposed it would be convenient that sanitary conveniences should be placed so that the access to and egress from them should be in the subway.

I agree that when you have underground conveniences you must have approaches other than mere entrance to and exit from them; in the nature of things you must have stairs or a slope leading to the conveniences, and this must occupy considerable lateral space. There must be an approach, and probably, if the corporation or other sanitary authority had really fixed upon a particular passage as affording a proper approach to the conveniences as such, it would not have been right for us to review their discretion in that respect. But no such question arises in the present case if once we arrive, as I have done, at the conclusion of fact that, as was said in one of the letters which I have read, "the intention is the construction of a subway to facilitate pedestrians crossing from one side to

the other of a thoroughfare of great width and very considerable traffic."

Under these circumstances, I think the appeal ought to be allowed. The remedy given to the plaintiffs should, I think, be wider than that which Joyce J. has given them. In giving this remedy we wish to give it in the manner which will be least detrimental to the public. There is the subway; there are these conveniences. Whether they are in a convenient position or not it is not for us to say—the sanitary authority will consider that; but I have no doubt that, apart from the conveniences, the subway is of considerable advantage to pedestrians crossing this wide thoroughfare. Under these circumstances, although I think that the injunction ought not to be limited to what has been called the excess of 2 ft. 9 in., yet I wish to give the corporation an opportunity of doing, as I am sure they would wish to do, that which is most for the benefit of the public, and at the same time consistent with the law as we lay it down. If we now say that it may be right ultimately to grant an injunction, we can still give to the corporation an opportunity of making, or undertaking to make, such alterations as will relieve us from the necessity of granting an injunction at all. If we hold our hand in that way, and give the corporation liberty to apply to us—of course, the plaintiffs must also have liberty to apply in case there should be delay—it may be that the corporation will satisfy us that they have either made, or are immediately going to make, such alterations as will justify us in not granting an injunction at all. I take it for granted that the plaintiffs will, in a matter of this sort, facilitate the work which the corporation have to do, and will be prompt and ready to agree to any alterations which may reasonably and properly be suggested by the corporation.

STIRLING L.J. The defendant corporation, purporting to act under statutory powers conferred on them as the sanitary authority within the city of Westminster, have constructed at the south end of Parliament Street a public sanitary convenience and a subway, both of which stand in part on the

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subsoil of Parliament Street at a point where that subsoil is admitted for the present purpose to be vested in the plaintiffs, who are the owners of a house in Parliament Street. The plaintiffs allege that the subway has been constructed without any statutory power for the purpose. On this appeal (whatever may have been the case before) no complaint is made of the erection of the sanitary conveniences, but it is alleged that the subway has been made without any proper authority, and at the bar an injunction has been asked to restrain the corporation from maintaining or using the subway. This relief is sought on two grounds. First, on the ground which is thus stated by Lord Cranworth in *Galloway* v. *London Corporation* (1): "It has become a well-settled head of equity, that any company authorized by the Legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing." The other ground is, that the corporation, having made this subway without any authority, are in the position of continuing trespassers on the plaintiffs' soil; and, for that reason, in accordance with the decision of this Court in *Goodson* v. *Richardson* (2), the plaintiffs are entitled to the injunction for which they ask. If the fact be that the subway has been made without any statutory authority, it seems to me that relief may properly be given on both these grounds; and the main question in the action is whether this subway has been thus improperly made.

Now, as regards the statutory authority, the matter stands thus. However useful it may be that in much-frequented streets subways for the use of passengers should be made, the Legislature has not yet thought fit to confer that power on any corporate body having authority within this city. It has by s. 44 of the Act of 1891 conferred on every sanitary authority within the area governed by that Act power to provide and maintain, amongst other things, public sanitary conveniences in situations where they deem the same to be required, and has provided that for the purpose of such provision the subsoil of any road shall be vested in the sanitary authority. It is

(1) (1866) L. R. 1 H. L. 34, 43. (2) L. R. 9 Ch. 221.

under this section, and under it alone, that the defendants justify what they have done.

The corporation allege that it is within their power under this section, not merely to determine the situation in which the sanitary conveniences are to be placed, but also the proper and reasonable mode of providing for the entrance and exit of the persons who use them, and they contend that they are not limited to making these entrances and exits simply by means of lifts or stairs, but that they may, if they think fit, make proper approaches from the pavement to the conveniences when they are situated under the roadway. I will assume that that contention is well founded, and then the question is simply reduced to this: Was this subway constructed as an approach to the conveniences, or was it constructed with the object that it might be used by the public for passing from one side of Parliament Street to the other?

Upon the evidence I come to the conclusion that the latter was the real object with which the subway was constructed. [His Lordship referred to the evidence on this point, and continued:—]

It seems to me from its size, and from the statement of the chairman of the committee of the council that "it is a subway as well as an approach," that the subway has been constructed in such a way as to be far more than an approach to the conveniences, and that it is not merely a reasonable and proper approach to them.

In these circumstances, I think the plaintiffs are entitled to the injunction which they ask. But, as it is possible that the subway may be so altered as to make it a reasonable and proper approach to the conveniences, I think it is right that the corporation should have an opportunity of making such an alteration if they see fit to avail themselves of it; and therefore I agree in the form of judgment which has been proposed.

COZENS-HARDY L.J. I am of the same opinion. I entirely agree with what has been said by my learned brethren, and I should not wish to add anything were it not that we are differing from the judgment of Joyce J.

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Two things, I think, are quite clear: first, that the corporation have no power to construct a subway, or, if they have power under some of their general Acts to incur the expense of constructing a subway, they certainly have no power to take the plaintiffs' land compulsorily for that purpose. It is, I think, equally clear that they have power under s. 44 of the Act of 1891 to provide and maintain sanitary conveniences, and for that purpose to take and use that portion of the property of the plaintiffs which is under the roadway, exclusive of the footway. These propositions being clear, we must approach the consideration of this question having regard to the perfectly well-established and extremely important jurisdiction which the Court of Chancery has exercised from the earliest days of railway legislation, and probably long before—the jurisdiction, I mean, to say that public bodies authorized by Parliament to take land shall not be allowed to take it except for the purpose authorized by Parliament. And, if that doctrine is important in ordinary cases in which compensation is provided for all land taken, it is specially obligatory on the Court to have regard to it in a case in which a public body is authorized to take property without making any provision for the compensation of the owner.

In my view, therefore, the question for our consideration is this: With what purpose was this land really taken? In *Stockton and Darlington Ry. Co.* v. *Brown* (1) Lord Cranworth said that, although the railway company are the sole judges of what lands they require, and will take for their purposes, there is this proviso: "Provided only that they take them bonâ fide with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose."

Now, I cannot bring myself to doubt what was the purpose for which this land was taken by the defendant corporation. I observe that Joyce J. said (2) (and this, no doubt, is the foundation of his judgment): "Their primary object was, in my opinion, the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom." If I had come to that conclusion of fact, I should probably have

(1) 9 H. L. C. 246, 256. (2) [1902] 1 Ch. 278.

agreed almost entirely with his judgment. But, being unable to come to that conclusion of fact, having satisfied myself from the documentary evidence that the primary object of the corporation was to construct a subway to facilitate passage from one side of Parliament Street to the other, I come to the conclusion that the corporation are now seeking to justify that which was a wrongful act by saying that they could rightly take, not the whole, but a part of the land for a purpose authorized by s. 44. I do not think they ought to be allowed to do that. I feel very strongly that in every case in which a public body, intrusted with the duties of performing a public work, say that they have, in the exercise of their discretion, fixed upon a particular place and a particular mode of carrying out the work, the Court ought to be extremely slow to interfere with their discretion. But when they have not really been acting under the authority of their Act, when they have been doing something outside their statutory power, and have been governed by considerations of a different kind, the question of discretion seems to me to have no bearing whatever on the case.

For these reasons I agree with what has been said, and I think that the injunction ought to be granted, qualified as my Lord has said. In the Court below the learned judge, finding as he did that the plaintiffs had succeeded in part and failed in part, gave no costs; but now the plaintiffs must have the costs in the Court below as well as the costs of the appeal.

Solicitors: *C. de J. Andrewes; Allen & Son.*

W. L.

C. A.
1903
JOYCE J.
March 31;
April 1.
C. A.
1904
Jan. 12, 13;
March 7.

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[1902 K. 1098.]

Estoppel in Pais—Mortgage prior to the Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41)—*Lease by Mortgagor—Affirmance by Mortgagee.*

In 1881, before the coming into operation of the Conveyancing and Law of Property Act, 1881, leasehold premises were mortgaged by way of sub-demise to N. for the residue of a newly created term of sixty years, less the last three days thereof. In 1892 the mortgagor purported to underlet the premises to G. & Co. for twenty-one years at a rent of 140*l.*, and the deed contained a covenant not to sublet without the consent of the landlord. In 1895 N. foreclosed the mortgagor, but did not get in the last three days of the term, and thenceforward G. & Co. paid the rent to N. until his death in 1899. Subsequently G. & Co. sublet the premises under a licence given by N.'s executors, who therein described themselves as being the reversioners on the underlease of 1892. The plaintiff, who claimed through N.'s executors, brought an action against G. & Co. and their sub-lessee to recover possession of the premises upon the footing that the underlease was not binding on him:—

Held, that he was estopped as against both defendants from denying that he was the reversioner on the underlease, and that the action failed.

Decision of Joyce J. affirmed.

Per Joyce J.: In the case of a lease by a mortgagor (apart from s. 18 of the Conveyancing and Law of Property Act, 1881), the acceptance of rent by the mortgagee from the lessee, though it converts the lessee into a tenant from year to year of the mortgagee, does not of itself imply that the tenancy is to be upon the terms of the lease so far as applicable to the yearly tenancy.

THIS was an action to recover possession of certain vaults and offices under the Princess's Theatre, Oxford Street.

By an indenture of lease dated December 11, 1880, the Princess's Theatre and the vaults and offices thereunder were demised by Edward Bailey to Walter Gooch, as to part of the premises for the term of sixty and a quarter years from April 6, 1880, as to a further part thereof for the term of sixty years from July 6, 1880, and as to the residue thereof for the term of fifty-nine and a quarter years from April 6, 1881, at the rent therein mentioned.

By an indenture of mortgage dated March 9, 1881, the premises comprised in this lease were mortgaged by Gooch to

W. T. Neve by way of sub-demise for the residue of the several terms granted by the lease of December, 1880, except the last three days thereof respectively, to secure 20,000*l.* and interest. The mortgage contained no declaration of trust with regard to the last three days of the respective terms except in the event of a sale by the mortgagee under his power of sale. Some time prior to the date of the indenture next hereinafter mentioned, the premises comprised in the lease of December 11, 1880, became vested in Mrs. Harriet Gooch for the residue of the several terms thereby granted, but subject to the mortgage of March 9, 1881.

By an indenture dated March 24, 1892, Mrs. Gooch (therein called the lessor) purported to let the vaults and offices under the theatre to the defendants, R. Gancia & Co., Limited (therein called the lessees), for a term of twenty-one years from March 25, 1892, at the yearly rent of 140*l.*

This indenture contained a covenant by the lessees not to assign or underlet without the previous consent in writing of the lessor, her executors, administrators, or assigns, and it also contained a proviso for re-entry in the event of the lessees being wound up.

This indenture is hereinafter referred to as the underlease.

By an order made on March 21, 1895, in an action by Neve against Mrs. Gooch for foreclosure of the mortgage of March 9, 1881, it was ordered that Mrs. Gooch should thenceforth stand absolutely foreclosed "from all right title interest and equity of redemption of in and to the said mortgaged premises." Neve, however, took no steps to get in the last three days of the term comprised in the lease of December 11, 1880.

The defendants Gancia & Co. were not parties to the foreclosure proceedings.

From the date of the foreclosure order the defendants Gancia & Co. paid the rent reserved by the underlease of March 24, 1892, to Neve until his death in March, 1899; and the counterpart of this underlease was handed over to Neve by Mrs. Gooch.

By an indenture dated November 27, 1899 (hereinafter called the sub-lease), the defendants Gancia & Co. let the vaults under

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the theatre and a part of the offices belonging thereto (reserving to themselves the remaining part of the offices) to S. F. Sinclair and the defendant M. S. Sinclair for a term of thirteen years and three months, less ten days, from December 25, 1899, at the yearly rent of 240*l*. Subsequently the whole interest under this sub-lease became vested in the defendant M. S. Sinclair. This sub-lease was granted under a licence given on October 13, 1899, by Neve's executors to the defendants Gancia & Co.; and in this licence Neve's executors were described as being the persons in whom the reversion expectant on the determination of the underlease of March 24, 1892, was then vested.

By a deed of assignment dated August 9, 1900, Neve's executors, in consideration of 28,000*l*., assigned to the plaintiff the premises comprised in the lease of December 11, 1880, for the residue of the several terms granted by the said lease, less the last three days of each of the said terms and for all such estates and interests in the nominal reversions expectant on the determination of the same terms respectively as the executors had power to assign, and the assignment was expressed to be made subject (as to such parts of the said premises as were subject thereto) to and with the benefit of the underlease of March 24, 1892.

Upon the execution of this assignment the counterpart of the underlease was handed by Neve's executors to the plaintiff. From the date of this assignment the defendants Gancia & Co. paid the rent reserved by their underlease to the plaintiff.

On October 1, 1901, the plaintiff served a notice of dilapidations on the defendants Gancia & Co., and threatened to determine the underlease.

On October 8, 1902, an order was made for the winding-up of the defendants Gancia & Co.

At this date the defendant Sinclair was in possession as tenant under the sub-lease of November 27, 1899, of part of the premises in question in this action, and the defendants the London and Westminster Bank, as equitable mortgagees of the defendants Gancia & Co., were in possession of the remaining part of the premises, and were also in receipt of the rents reserved by the sub-lease.

On October 29, 1902, the plaintiff served upon the defendants and upon the official receiver a notice demanding possession of the vaults and offices comprised in the deed of March 24, 1892.

On December 20, 1902, the plaintiff, by leave of the Court, commenced this action against R. Gancia & Co., the London and Westminster Bank, and M. S. Sinclair for possession of the premises.

The claim of the plaintiff to possession was put in two alternative ways. He claimed, first, as mortgagee by a title overriding the underlease of March 24, 1892, and the sub-lease of November 27, 1899. This claim was founded on the fact that the underlease of March 24, 1892, had been granted by a mortgagor under a mortgage executed prior to the coming into operation of the Conveyancing and Law of Property Act, 1881, without the concurrence of the mortgagee, and was consequently not binding upon the mortgagee. Secondly, he claimed as reversioner by reason of the proviso for re-entry in the underlease.

The defendants Gancia & Co., by their defence, in answer to the first claim, relied upon the facts above set out as shewing that Neve and his executors had by their conduct elected to affirm the underlease of March 24, 1892, and that the plaintiff took subject thereto. With regard to the second claim, they admitted the forfeiture, subject to the provisions of s. 14 of the Conveyancing and Law of Property Act, 1881, and s. 2 of the Conveyancing and Law of Property Act, 1892; and they took out a summons for relief under those Acts. This summons came on for hearing with the trial of the action before Joyce J. on March 31, 1903. The defendant Sinclair, who claimed under the sub-lease of November 27, 1899, by counter-claim, and also by an action *Sinclair* v. *Keith*, which was stayed pending this action, claimed a vesting order under s. 4 of the Act of 1892.

Dibdin, K.C., and *E. R. Simpson*, for the plaintiff. This action is brought on the footing that the underlease of March 24, 1892, and the sub-lease of November 27, 1899, are not binding

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on the plaintiff. The mortgage to Neve having been executed prior to the commencement of the Conveyancing and Law of Property Act, 1881, the underlease of March 24, 1892, was void in the first instance as against the mortgagee, and nothing took place to alter the position of the parties prior to the foreclosure order of March 21, 1895. That was a foreclosure of the mortgage term and nothing else. It did not include the last three days of the terms comprised in the lease of December 11, 1880. If it was intended to get in the last three days they should have been expressly included in the order: *British Empire Mutual Life Assurance Co.* v. *Sugden.* (1) Consequently Neve did not become the assignee of Mrs. Gooch, and there was no privity between him and Gancia & Co. But Gancia & Co., having part of the equity of redemption in them, had the right to redeem. They did not do that, but they paid the rent to Neve. The effect of that was to destroy the old tenancy of Gancia & Co. as underlessees, and with it their right to redeem, and to create a new tenancy with Neve upon the terms of the abortive underlease so far as applicable; but the acceptance of the rent by Neve was not an adoption by him of the abortive underlease: Robbins' Law of Mortgages, vol. i. p. 679; *Doe* v. *Ongley* (2); *Doe* v. *Thompson* (3); *Oakley* v. *Monck* (4); *Wyatt* v. *Cole* (5); *Underhay* v. *Read* (6); *Doe* v. *Bucknell* (7); *Corbett* v. *Plowden.* (8) Then what is the effect of the assignment of the mortgage term to the plaintiff subject to the underlease? The mere representation in the purchase deed that the assignment was subject to the underlease had no effect in setting up the underlease, because Gancia & Co. were not parties to it. If Neve's executors were bound by reason of what had gone before to make good the underlease, then, no doubt, the plaintiff would be similarly bound, because he would be bound to indemnify Neve's executors if they were under any obligation to Gancia & Co.; but he is not

(1) (1878) 26 W. R. 631; 47 L. J. (Ch.) 691.
(2) (1850) 10 C. B. 25.
(3) (1847) 9 Q. B. 1033.
(4) (1866) L. R. 1 Ex. 159.
(5) (1877) 36 L. T. 613.
(6) (1887) 20 Q. B. D. 209.
(7) (1838) 8 C. & P. 566.
(8) (1884) 25 Ch. D. 678.

bound on any other footing. This is not a representation by which Gancia & Co. can take anything: *Doe* v. *Ongley* (1); *Doe* v. *Archer* (2); *Smith* v. *Widlake*. (3)

Then as regards Sinclair, the terms of the licence of October 13, 1899, are relied on as creating an estoppel which prevents the plaintiff from impeaching the sub-lease; but the statement that Neve's executors were entitled to the reversion expectant on the underlease ought not to have deceived Gancia & Co., because they had the means of knowing what the truth was. That in itself is fatal to estoppel. The question of estoppel is discussed in Co. Litt. pp. 352 a, 352 b, and it is there laid down that "estoppell against estoppell doth put the matter at large." That means that a wrong statement does not create an estoppel where the person to whom the statement is made knows the truth, or has the same means of knowing the truth as the person who makes the statement: *Dixon* v. *Kennaway & Co.* (4) Here Gancia & Co. and Neve's executors were in the same state of knowledge. Another rule is that "every estoppell, because it concludeth a man to alleadge the truth, must be certaine to every intent, and not to be taken by argument or inference." Applying that rule to this case, the statement that Neve's executors were the persons in whom the reversion was then vested was perfectly consistent with the reversion having been obtained after the date of the underlease, in which case it would not improve the position of the underlessees: *Doe* v. *Ongley* (1); *Doe* v. *Thompson* (5); so that the representation fails in being strictly a statement ad rem. Further, as regards Sinclair. Neve's executors are not estopped by the licence because Sinclair was not a party to it, and there is no evidence that it was ever intended by the executors to be shewn to him; it was given for the protection of Gancia & Co. Further, no case of acquiescence can be made out by the defendants, because it is not shewn that either Neve, or Neve's executors, or the plaintiff, knew that the underlease was bad, and there can be no acquiescence without

(1) 10 C. B. 25.
(2) (1796) 1 Bos. & P. 531.
(3) (1877) 3 C. P. D. 10.
(4) [1900] 1 Ch. 833, 840.
(5) 9 Q. B. 1033.

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knowledge: *Willmott* v. *Barber* (1); *Earl Beauchamp* v. *Winn.* (2) Lastly, if this licence, which is not under seal, is held to have the effect of creating out of the mortgage term a valid lease in favour of Gancia & Co. for the residue of the term granted by the abortive lease, that would be in substance to repeal the Statute of Frauds and the Real Property Act, 1845, which respectively require that a lease for more than three years must be in writing and by deed: *Swan* v. *North British Australasian Co.* (3), per Martin B.

Hughes, K.C., and *Frank Wright*, for the defendants R. Gancia & Co. and the London and Westminster Bank. The effect of the foreclosure order was to vest the whole of the mortgagor's interest in Neve, and Neve by obtaining that order came in as owner and deliberately gave up his right to assert his paramount title as mortgagee: *Heath* v. *Pugh.* (4) The lease by the mortgagor was not a void lease, but operated against the mortgagor by estoppel, and if the mortgagee, with the concurrence of the lessees, chose to affirm that lease he might; and where a voidable document becomes a good one owing to estoppel neither the Statute of Frauds nor the Real Property Act, 1845, has any application. Here the plaintiff and his predecessors have made the very plainest representations that this underlease is a subsisting lease. We rely particularly on the licence. If a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have relied upon his representation; and it is not necessary that the representation should be wilfully false: *Cairncross* v. *Lorimer* (5); *Pickard* v. *Sears* (6); *Freeman* v. *Cooke* (7); *Gregg* v. *Wells* (8); *Carr* v. *London and North*

(1) (1880) 15 Ch. D. 96.
(2) (1873) L. R. 6 H. L. 223.
(3) (1862) 7 H. & N. 603, 643.
(4) (1881) 6 Q. B. D. 345, 360.
(5) (1860) 3 Macq. 827.
(6) (1837) 6 Ad. & E. 469; 45 R. R. 538.
(7) (1848) 2 Ex. 654.
(8) (1839) 10 Ad. & E. 90; 50 R. R. 347.

Western Ry. Co. (1) We rely also on the terms of the assignment to the plaintiff. That, no doubt, cannot be treated as an estoppel because Gancia & Co. were not parties to it, but it is the plainest possible evidence that Neve's executors and the plaintiff had elected to affirm the lease. That view is confirmed by the notice of dilapidations served by the plaintiff on Gancia & Co. on October 1, 1901. *Corbett* v. *Plowden* (2) shews that a mortgagee may either assert his paramount title and disaffirm the lease or allow it to stand; but the Court found upon the facts of that case that the mortgagee had asserted his paramount title. In the present case everything that has been done by the plaintiff and his predecessors in title in reference to this underlease has been done, not in exercise of any paramount right which they might have as mortgagees, but in exercise of the rights vested in Mrs. Gooch. Until the end of 1902 everybody proceeded on the footing that the lease was good and that no claim would be made by the mortgagee, and it is now too late for the plaintiff to assert his paramount title.

Younger, K.C., and *E. Ford*, for the defendant Sinclair, adopted the foregoing argument. With regard to the position of the sub-lessee as distinguished from that of the underlessees, they contended that the licence was granted by Neve's executors for the express purpose of being acted on, and consequently no one claiming through them could be heard to say as against Sinclair, who had become possessed of the property on the faith of the licence, that that was now to be treated as a licence revocable at will.

Dibdin, K.C., in reply.

JOYCE J. The first and practically, I think, the only question that really arises in this case is as to the effect of what took place between the parties in October and November, 1899. Now, at that time Neve had foreclosed, and he was dead, and the term under the foreclosure was vested in his executors, and they were receiving from Gancia & Co. the same rent as was reserved by the document which we have

(1) (1875) L. R. 10 C. P. 307. (2) 25 Ch. D. 678.

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called the underlease. Suppose at that time that the executors of Neve and Gancia & Co. and the Sinclairs had entered into a tripartite agreement which recited that the executors of Neve were the reversioners on Gancia & Co.'s underlease, and that they had been asked to consent, under the terms of that underlease, to the granting of the sub-lease by Gancia & Co., and that Gancia & Co. had thereby agreed expressly, with such consent, to grant the sub-lease to the Sinclairs. If such a document as that had been made and executed by the three parties, to my mind it is absolutely clear that the executors of Neve could not afterwards have turned round and set up their paramount title as mortgagees, or as representing the mortgagee, and have asserted that Gancia & Co. had no underlease at all. They could not have asserted that either as against Gancia & Co. or as against Sinclair, who took under the sub-lease.

Now, upon carefully considering the circumstances of the case and looking at the correspondence and documents, I am of opinion that what happened is really equivalent to such an agreement in fact, and I hold that these executors, whose testator had foreclosed, were, as reversioners on the underlease, in truth and substance parties to the sub-lease to the Sinclairs and fully concurred in it.

What took place next was the sale and assignment to Keith in August, 1900. Upon that sale it appears perfectly clear to me that all the parties had full knowledge—not merely notice, but full knowledge—of everything that occurred, and knew exactly how matters stood. When it was completed, the counterpart of the underlease appears to have been handed over to the purchaser, Mr. Keith. In my opinion, the true construction of that assignment is that it amounts to an agreement between the vendors, the executors of Neve, who, as I think, had incurred a responsibility both to Gancia & Co. and to Sinclair and the purchaser, Keith, that that sub-lease and the underlease should continue to subsist. At all events, if I am wrong in this, it is clear, to my mind, that Keith, the purchaser at that sale, was not and could not be as against Gancia & Co. or Sinclair in a better position than the

executors of Neve themselves were. The result is, in my opinion, that the present plaintiff cannot successfully maintain that as against him the sub-lease is not subsisting, or that as against him the underlease is not subsisting; and that this was the view which Keith, the purchaser, and his advisers took of the matter is plain from their notice with respect to the dilapidations, and from their notice which purported to forfeit the underlease. That really disposes of the action.

Perhaps I may say one word with reference to the general law as to leases granted by a mortgagor after the mortgage. I think the result of the cases is that, although the mere payment and receipt of rent as between the lessee and the mortgagee may convert the lessee into a tenant from year to year, it does not follow from that alone that the lessee holds upon the terms of the lease so far as they are applicable to a tenancy from year to year. I think, as stated in Smith's Leading Cases and in other text-books, that in every case it is a matter of evidence or inference from what is done. When a new tenancy is thus created the terms of such new tenancy must be proved by evidence, and the mere fact that the tenant is paying rent to the mortgagee after notice is no evidence that the tenancy is to be on the same terms as those on which the tenant held under the mortgagor. To my mind that is made out distinctly by the judgments of Willes and Blackburn JJ. in the case of *Oakley* v. *Monck*. (1) The plaintiff says the result was that there was an agreement that Gancia & Co. should hold as tenants from year to year upon the terms of the underlease, so far as applicable to a tenancy from year to year. I am unable to see anything from which I can infer any such agreement; but I do see my way to infer an agreement, and I think there was in effect an agreement, that the underlease should continue to subsist, and therefore it appears to me the action fails.

[His Lordship then made an order upon the summons taken out by Gancia & Co., relieving them against the forfeiture upon terms agreed upon by the parties, and he directed Sinclair's counter-claim to stand over generally.]

H. B. H.

(1) L. R. 1 Ex. 159.

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The plaintiff appealed. The appeal came on for hearing on January 12, 1904.

Levett, K.C., and *E. R. Simpson*, for the plaintiff. The mortgage of March 9, 1881, having been executed before the Conveyancing Act, 1881, came into operation, s. 18, sub-s. 1, does not apply, and Mrs. Gooch as mortgagor in possession could not without the consent of the mortgagee make a lease which would bind him. Consequently, the lease of March 24, 1892, was invalid as against the mortgagee. Notwithstanding the foreclosure the last three days of the original terms were left outstanding in the mortgagor, for there was not any trust that the mortgagor would stand possessed of those interests for the mortgagee.

The effect of the payment of rent under the lease of March 24, 1892, to the mortgagee was only to create a yearly tenancy on the same terms and conditions as those of the lease so far as they were consistent with a yearly tenancy: *Wyatt* v. *Cole* (1); *Dougal* v. *McCarthy*. (2) In those cases the payment of rent had not been made to a mortgagee, but it is submitted that the principle is the same.

[ROMER L.J. referred to *Brown* v. *Storey*. (3)]

That case goes too far in our favour; it is a question of evidence in each case whether the terms of the old tenancy are to be imported. Acts done under a mistaken belief that Gancia & Co. were in possession under the lease are not evidence of a fresh agreement for a lease: *In re Northumberland Avenue Hotel Co.* (4); *Doe* v. *Bucknell*. (5) The doctrine of estoppel by conduct as laid down by such cases as *Pickard* v. *Sears* (6) and *Freeman* v. *Cooke* (7) has no application to the law of real property. Those were commercial cases, in which the property passed, to use the language of Lord Denman in *Pickard* v. *Sears* (8), "without any of those formalities that throw technical obstacles in the way of legal evidence." The

(1) 36 L. T. 613.
(2) [1893] 1 Q. B. 736, 741.
(3) (1840) 1 Man. & G. 117, 126.
(4) (1886) 33 Ch. D. 16.
(5) 8 C. & P. 566.
(6) 6 Ad. & E. 469; 45 R. R. 538.
(7) 2 Ex. 654.
(8) 6 Ad. & E. 474.

mistake here was that Neve's executors erroneously described themselves in the licence as reversioners on the lease of March, 1892. Under that lease some interest passed from the lessor, Mrs. Gooch, and the lease took effect as a concurrent lease. The statement that Neve's executors were the reversioners on that lease did not amount to a representation that that concurrent lease was a good lease in possession. The defendants cannot spell out of this licence an agreement by Neve's executors to grant out of their paramount title as mortgagees a new lease, for the Statute of Frauds requires that such an agreement should be in writing; and by the Real Property Act, 1845, a lease such as the defendants seek to set up could only be granted by deed. The doctrine of estoppel in pais has never been extended so as to make effective the grant of an interest which the law says shall not pass except in one particular way, namely, by deed. Therefore this estoppel effects nothing. If no interest had passed from Mrs. Gooch it may be that different considerations would have applied, but where some valid interest passes from the lessor that interest cannot be enlarged by estoppel: Burton on Real Property, par. 850. Estoppel to be effectual must be reciprocal, and it is submitted that Neve's executors immediately after giving the licence could not have insisted that Gancia & Co. were their tenants for the full period of the lease. The defendants had the same means of knowledge as the plaintiff and his predecessors in title, and that is sufficient to prevent the creation of any estoppel: *Willmott* v. *Barber*. (1)

Hughes, K.C., and *Frank Wright*, for the defendants Gancia & Co. and the London and Westminster Bank. The effect of the foreclosure order was to vest the whole of the mortgagor's interest in Neve just as if he had taken an assignment, and from that date he was in the same position as Mrs. Gooch: *Heath* v. *Pugh*. (2) The licence was granted by Neve's executors as the legal owners of the reversion, and it was given for the purpose of enabling Gancia & Co. to grant the sub-lease to the Sinclairs. That clearly created an estoppel in pais: *Pickard*

(1) 15 Ch. D. 96. (2) 6 Q. B. D. 345, 360.

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v. *Sears* (1); *Freeman* v. *Cooke* (2); *Cairncross* v. *Lorimer*. (3) Further, where a lease has been granted by a mortgagor, the mortgagee may with the concurrence of the lessee affirm the lease: *Corbett* v. *Plowden* (4); and, if that is possible, the facts here are strong to shew that the plaintiff and his predecessors in title did affirm this underlease. That is plain from the licence, from the form of the assignment to the plaintiff, and from the notice as to dilapidations.

[STIRLING L.J. referred to Woodfall's Law of Landlord and Tenant, 17th ed. p. 233.]

We do not dispute the proposition that the mere acceptance of rent is not of itself an affirmance of the lease.

Younger, *K.C.*, and *E. Ford*, for the defendant Sinclair. There are two questions. (1.) What was the position of the lessees Gancia & Co. as against Neve immediately after the foreclosure order? (2.) What was the position of the parties after the sub-lease? As to (1.): The lease granted to Gancia & Co. operated only by way of estoppel. It is said that, inasmuch as Mrs. Gooch had the last three days of the term left in her, this is not a lease by estoppel; but no authority is cited for that proposition, and it has never before been suggested that a lease granted by a mortgagor under a mortgage by sub-demise is in any respect different from a lease granted by any other mortgagor. Mrs. Gooch had no power effectually to grant the lease which she purported to grant by the interest which she then had. If she had paid off the mortgage she would have had the power, and it is impossible to say that she would not have been bound, to make good the lease. Then, assuming this to have been a lease by estoppel, the effect of the foreclosure order was that the burden and benefit of that lease passed to Neve just as if there had been an assignment to him from Mrs. Gooch. It is said that the relationship between Neve and Gancia & Co. was one which was brought into existence by the exercise of his paramount right; but Neve made no claim by virtue of that right until after the mortgage had

(1) 6 Ad. & E. 469; 45 R. R. 538.
(2) 2 Ex. 654.
(3) 3 Macq. 827.
(4) 25 Ch. D. 678.

ceased to exist. As to (2.): The licence contained a clear representation that Neve's executors were the reversioners expectant on the lease; but it is objected that that will not get over the difficulty that the lease must be by deed. The answer is that the executors were not granting a new lease. They merely purported to adopt the act of Mrs. Gooch when mortgagor in granting the lease. All that the licence meant was that the executors purported to give liberty to Gancia & Co. to grant the sub-lease. There was no necessity for a new lease. It was a ratification by a principal of an act which is treated as having been done by an agent on his behalf. It is estoppel and nothing else.

Levett, K.C., in reply. *Corbett* v. *Plowden* (1) shews that when once the mortgagee has stepped in with his paramount right the lease is gone. From 1895 to 1899 Gancia & Co. were tenants from year to year, and they might have determined the tenancy by a six months' notice at the end of any of those years. The mortgagee cannot adopt the lease; there must be a new lease. Further, the relief granted by the Conveyancing Acts does not apply to a lease by estoppel: see Conveyancing Act, 1881, s. 14, sub-s. 3; Conveyancing Act, 1892, s. 5.

Cur. adv. vult.

March 7. VAUGHAN WILLIAMS L.J. delivered the judgment of the Court (Vaughan Williams, Romer, and Stirling L.JJ.). After stating the facts substantially as above set out, he continued as follows:—Now Joyce J., in dealing with the action, puts it in this way. He says: "Suppose" in November, 1899 (that is to say, before the assignment to the plaintiff), "the executors of Neve and Gancia & Co. and the Sinclairs had entered into a tripartite agreement which recited that the executors of Neve were the reversioners on Gancia & Co.'s underlease, and that they had been asked to consent, under the terms of that underlease, to the granting of the sub-lease by Gancia & Co., and that Gancia & Co. had thereby agreed expressly, with such consent, to grant the sub-lease to the

(1) 25 Ch. D. 678.

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Sinclairs. If such a document as that had been made and executed by the three parties, to my mind it is absolutely clear that the executors of Neve could not afterwards have turned round and set up their paramount title as mortgagees, or as representing the mortgagee, and have asserted that Gancia & Co. had no underlease at all. They could not have asserted that either as against Gancia & Co. or as against Sinclair." The learned judge, having said this, goes on to say that in his opinion what happened is really equivalent to such an agreement in fact, and he held that these executors, whose testator had foreclosed, were, as reversioners of that underlease, in truth and in substance parties to the sub-lease to the Sinclairs, and fully concurred in it. We are not quite sure what this means. In the first place, we assume that in the supposed tripartite agreement the learned judge means that Gancia & Co. had agreed to grant a sub-lease, and that the executors had agreed that Gancia & Co. should do so, and that he does not mean by the supposed agreement that the executors agreed themselves to grant a lease to the Sinclairs. If we are right, the supposed agreement would have been carried out, so far as the grant of the lease by Gancia & Co. to the Sinclairs is concerned; and the only agreement which it could have been said that the executors had broken would have been an implied agreement that they would not, in contravention of the recitals, deny that they were reversioners of Gancia & Co.'s underlease, and invalidate the consent which they purported to give, as reversioners of Gancia & Co.'s lease, to the sub-lease by the assertion of a paramount title inconsistent with the subsistence of Gancia & Co.'s sub-lease. But this view of the tripartite agreement, even if it can be supported, is hardly consistent with the result indicated by Joyce J. as following on the assumption that what happened was equivalent to such an agreement in fact, because he says, "I hold that these executors, whose testator had foreclosed, were, as reversioners on the underlease, in truth and substance parties to the sub-lease to the Sinclairs and fully concurred in it." Such a result would not follow as the consequence of a breach of an implied covenant not to invalidate the sub-lease to be granted by Gancia & Co. to

the Sinclairs. Such an implied covenant would not make the executors parties to the sub-lease, or make them concur in it, in the ordinary sense of that word. We are not quite sure that the learned judge, in the passages which I have quoted, has not somewhat confused the agreement which he suggests with the estoppels arising on it, which we will consider presently; but it is sufficient to say at present that no estoppel preventing the executors from denying that they were the reversioners of Gancia & Co.'s lease could operate as a grant by them of a lease to the Sinclairs on the terms of the sub-lease granted by Gancia & Co. to the Sinclairs.

There is the difficulty also that the sub-lease, whoever grants it, is required by the Real Property Act, 1845, to be by deed, and that any agreement relating to land has by the Statute of Frauds to be in writing, and it is not easy to extract from the documents any implied agreement which would support the learned judge's view. Moreover, we are not satisfied that any agreement can be suggested as having been entered into without writing, which could be supported by part performance, and which would afford a defence in this action.

We propose now to deal with the question whether estoppel will enable the defendants successfully to defend this action. If the conduct of the plaintiff enables the defendants to do so, we do not trouble ourselves about the exact form of the pleadings. It is plain that all parties came into Court prepared to try the question of what is the effect of the plaintiff's assuming the character of reversioner and inducing the defendants to alter their position. That being so, all necessary amendments must be treated as made. That there is an estoppel preventing Neve's executors, Keith's predecessors in title, and therefore Keith, from averring as against Gancia & Co. or Sinclair that he really was not such reversioner, we do not doubt, for it seems to us plain that the executors by their words and conduct wilfully caused both Gancia & Co. and Sinclair to believe in the existence of a state of things and induced them to act on that belief, so as to alter their own previous position; and it seems to us that Keith, who claims through the executors, is concluded from averring against either Gancia & Co. or Sinclair

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a different state of things as existing at the same time. Now it is true that, where one has an estoppel in pais of this sort, the estoppel cannot go further than to prevent the party estopped from putting the party who has acted on his representation in a worse position than he would have been if that representation had been true. Then what would have been the position of Sinclair if Neve's executors had really had vested in them the reversion expectant upon the determination of Mrs. Gooch's lease to Gancia & Co.? (And observe this is quite a possible state of things, because there is no reason why they, being the assignees by way of sub-demise of Mrs. Gooch's lease of December 11, 1880, from Bailey, should not have taken an assignment from her of the reversion expectant upon the determination of the underlease granted by her to Gancia & Co.) We take it that Neve's executors, as the assignees of Mrs. Gooch, would no more have been entitled, as between Gancia & Co. and themselves, to deny Mrs. Gooch's title than Mrs. Gooch herself would have been. The result of this is that the plaintiff's action fails. He is not entitled to recover possession of the premises, because he is estopped from denying that he is reversioner in respect of the lease granted by Mrs. Gooch to Gancia & Co., and not the less so because at the time he represented himself as such he was as mortgagee entitled to say that the lease by Mrs. Gooch to Gancia & Co. did not bind him. We think that this estoppel against the plaintiff arises equally as between himself and Sinclair and as between himself and Gancia & Co. Both Sinclair and Gancia & Co. altered their positions by reason of the assertion by Neve's executors that the reversion attendant upon the determination of Gancia & Co.'s lease was vested in them. By reason of this assertion Gancia & Co. granted, and the Sinclairs accepted, the sub-lease. This did not make either Gancia & Co. or Sinclair the tenant of Neve's executors. The estoppel simply prevents Neve's executors, or their successor, the plaintiff, from denying that Mrs. Gooch's reversion was vested in them as alleged by them, or from setting up an overriding title inconsistent with the licence by them as reversioners authorizing the sub-lease to the Sinclairs. Moreover, the conduct both of Neve's executors and of the

plaintiff since the granting of the sub-lease of 1899 is only consistent with a continued assertion by them respectively of their position as reversioners and the validity of the sub-lease. We refer to the assignment to Keith being expressly subject to the sub-lease of 1899, and to the plaintiff's notice to Gancia & Co. to repair. We do not think that it makes the slightest difference that, on the admitted facts, and in particular the payment of the rent reserved under the underlease of 1892 to Neve's executors and to Keith, a tenancy from year to year under Neve's executors or Keith would ordinarily be inferred. This would be only part of the truth which the plaintiff would be estopped from denying. There is no evidence whatever that Gancia & Co. were aware of the true position of affairs. For the reasons which we have given, we think that the judgment of Joyce J. ought to be supported and this appeal dismissed with costs. We should wish to add that we entirely agree with the judgment so far as it relates to the relief against forfeiture. And with regard to the counter-claim by Sinclair for a vesting order, which Joyce J. had ordered to stand over, we see at present no reason why such an order should not be made under s. 4 of the Act of 1892.

Solicitors: *Batten, Proffitt & Scott; C. M. Barker; Routh, Stacey & Castle.*

H. B. H.

C. A.
1904
March 29.

In re CARR'S TRUSTS.
CARR *v.* CARR.

[1903 C. 3358.]

Lunacy—Person of Unsound Mind not so found—Application of Property for Maintenance—Jurisdiction of Chancery Division—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 116.

A lady, who was of unsound mind but not so found by inquisition, had been for some years in an asylum in Germany. Under the will of her father she was absolutely entitled to a trust fund. An originating summons was taken out in her name as plaintiff by a next friend, the trustees being defendants, asking for directions as to the maintenance of the plaintiff out of the income, and as to the application of the residue of the income and of so much (if any) of the capital as the Court should think fit for the comfort and benefit of the plaintiff. The fund was invested partly in India stock and partly on mortgage.

On the hearing of the summons Joyce J. declined to give any directions as to the maintenance of the plaintiff, being of opinion that, having regard to s. 116 of the Lunacy Act, 1890, that matter would be more properly dealt with in the Lunacy jurisdiction.

Upon the undertaking of the trustees to transfer the stock into court and to deposit in court the mortgage deed and other deeds in their hands relating to the mortgaged property, the Court of Appeal ordered that the interest on the stock and on the mortgage should, during the plaintiff's life or until further order, be paid to the plaintiff's sister (one of the trustees), she undertaking to apply the same for the maintenance, comfort, and benefit of the plaintiff. General liberty to apply was reserved.

Appeal from a decision of Joyce J.

By a settlement dated June 10, 1829, made on the marriage of Matthew Carr with Phœbe Dawson Lambton, power was given to the survivor of the husband and wife to appoint the trust funds by will among the children of the marriage. The wife died on December 21, 1859.

By his will, dated April 24, 1880, the husband appointed that the trustees of the settlement should stand possessed of the trust funds upon trust as to the sum of 4500*l.* for his daughter Caroline Emily Carr, subject, however, to the proviso hereinafter contained, namely, provided that and the testator thereby declared that the trustees should stand possessed of the sum of 4500*l.* thereinbefore appointed to his said daughter upon trust

for investment as therein mentioned, "and shall during the period of twenty-one years from my death apply the income of the said sum of 4500*l.*" or of the investments thereof "for the benefit of my said daughter" in such manner as the said trustees or trustee should in their or his discretion think fit, "my intent and meaning being that the said trustees or trustee should have absolute discretion either to apply" the income "of the said sum of 4500*l.* or any part thereof immediately for the purposes aforesaid, or pay the same or any part thereof at such times and in such manner and way as they may think fit into the hands of my said daughter, if they in their uncontrolled judgment are of opinion that my said daughter is able to manage her own affairs."

The testator died on December 10, 1882.

Caroline Emily Carr was of unsound mind, but had not been so found by inquisition. She had in 1878 been placed by her father in an institution for persons of unsound mind at Bonn, in Germany, pursuant to a certificate signed by the town physician of Bonn, and she had resided there ever since.

During the period of twenty-one years from the death of the testator the trustees had applied the whole of the income (except a sum of 164*l.* 18*s.* 5*d.*) of the investments representing the 4500*l.* in the maintenance and for the benefit of Caroline Emily Carr.

The period of twenty-one years having expired, an originating summons was issued on behalf of Caroline Emily Carr (by a next friend) as plaintiff against the trustees of the settlement and Henry Carr, a son of the testator (as representing the persons who might ultimately be entitled to the fund on one possible construction of the settlement and will), asking for a declaration that the plaintiff was absolutely entitled to the fund, and for directions as to the maintenance of the plaintiff out of the income, and as to the application of the residue of the income and of so much (if any) of the capital as the Court should think fit for the comfort and benefit of the plaintiff. The summons also asked that, if necessary, the trusts, so far as regarded the 4500*l.*, might be administered by the Court.

There was evidence of the plaintiff's unsoundness of mind,

C. A. 1904 CARR'S TRUSTS, *In re.* CARR *v.* CARR.

and Dr. Thomsen, the director of the institution at Bonn, deposed that in his opinion the plaintiff was not likely to recover. There was also evidence that personal service on the plaintiff of a summons or other proceedings in Lunacy "would cause violent excitement, and inflict upon her deep and enduring distress," and that, if the names of her sisters and the next friend or any of them appeared on any such proceedings, her excitement and distress would be intensified, and she would begin to distrust them, and the consequences would be most disastrous so far as her health and peace of mind and comfort were concerned.

The fund was invested partly in India stock and partly on mortgage.

On the hearing of the summons Joyce J. made a declaration that, according to the true construction of the settlement and will, the plaintiff was absolutely entitled to the fund. But "the judge, being of opinion that the question of maintenance ought to be dealt with in Lunacy," did not think fit to make any order with respect thereto, except to sanction the payment of a sum of 39*l.* made by the trustees for that purpose.

The learned judge was of opinion that, having regard to s. 116 of the Lunacy Act, 1890, the application for maintenance would more properly be made in the Lunacy jurisdiction.

The plaintiff by her next friend appealed.

Micklem, *K.C.*, and *H. Greenwood*, for the plaintiff. It is submitted that the Chancery Division has jurisdiction to make the order asked for, and that the case is a proper one for the exercise of that jurisdiction. The Court will be in effect administering the trusts. It has been held that a person lawfully detained out of England as a lunatic is not a person "lawfully detained as a lunatic" within s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890: *In re Watkins.* (1)

The jurisdiction of the Chancery Division is clear from such cases as *In re Tuer's Will Trusts* (2); *In re Brandon's Trusts* (3); *Vane* v. *Vane* (4); *New York Security and Trust Co.*

(1) [1896] 2 Ch. 336.
(2) (1886) 32 Ch. D. 39.
(3) (1879) 13 Ch. D. 773.
(4) (1876) 2 Ch. D. 124.

v. *Keyser* (1); *Didisheim* v. *London and Westminster Bank* (2); *In re Bligh.* (3) In a similar case recently before Kekewich J., that learned judge made an order such as is asked for here. Joyce J. declined to follow that case.

[VAUGHAN WILLIAMS L.J. referred to *In re Barlow's Will.* (4)]

Potts, for the trustees of the settlement.

THE COURT (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.), without delivering any formal judgments, ordered that the order of Joyce J. should be discharged so far as it declined to give any directions for the maintenance, comfort, and benefit of the plaintiff. And, the defendants (the trustees) by their counsel undertaking to transfer into court the India stock, and to deposit in court the mortgage deed and other title-deeds in their hands relating to the mortgage security, and the defendant Mary Eleanor Carr, a sister of the plaintiff, who was one of the trustees, undertaking to apply the money to be received by her under this order and the schedule thereto for the maintenance, comfort, and benefit of the plaintiff, it was ordered that the trustees do pay to Mary Eleanor Carr the balance of income in their hands up to the date of transfer, and the future income from the mortgage as and when the same should be received by them until further order. General liberty to apply was reserved.

The schedule directed that the interest as it accrued upon the stock during the life of the plaintiff or until further order should be paid to Mary Eleanor Carr.

Solicitors: *Carr, Scott, Smith & Gorringe.*

(1) [1901] 1 Ch. 666.
(2) [1900] 2 Ch. 15.
(3) (1879) 12 Ch. D. 364.
(4) (1887) 36 Ch. D. 287.

W. L. C.

BYRNE J.
1904
Jan. 26.

In re ARTISANS' LAND AND MORTGAGE CORPORATION.

Company — Statute of Limitations — Dividends unclaimed — Reduction of Capital by Return of Money to Shareholders — Companies Act, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

The holder of shares, the certificate of which is under the seal of the company and refers (as is usual) to the memorandum and articles of the company, is not barred by the Statute of Limitations until the expiration of twenty years—

(*a*) In respect of dividends declared on the shares, from the date of declaration:

(*b*) In respect of capital to be returned on the shares, from the date of notice of the order of the Court confirming the reduction.

In re Drogheda Steam Packet Co., [1903] 1 I. R. 512, followed.

THE Artisans' Land and Mortgage Corporation, Limited, was registered in 1892, under the Companies Acts, 1862 to 1890, as a company limited by shares, with a nominal capital of 187,500*l.* divided into shares of 1*l.* each. All the capital was fully paid up.

In August, 1893, the Court confirmed a special resolution, passed and confirmed by the company in May and June, 1893, that the capital of the company should be reduced to 93,750*l.* divided into 187,500 shares of 10*s.* each, the reduction to be effected by making a return to the shareholders of 10*s.* per share.

The directors of the company in June and July, and again in October and November, 1893, sent circulars to the shareholders informing them of the order made by the Court, and that the return of 10*s.* per share would be paid to them on their leaving their certificates for shares.

Some, but not all of the shareholders, accordingly sent in their certificates, and were paid the returns of capital on their shares.

In April and May, 1903, special resolutions were passed and confirmed for the voluntary winding-up of the company and the appointment of liquidators.

The liquidators took out a summons under s. 138 of the Companies Act, 1862, for a declaration that the claims of the shareholders who had not been paid the return of 10*s.* per share were barred by the Statute of Limitations; and that the claims of shareholders in whose favour warrants for dividends had been issued more than six years before the commencement of the winding-up were also statute-barred. An order was made appointing the respondents to represent the two classes of shareholders against whom the declaration was sought.

Whinney, for the liquidators. The reduction was in the shape of a return of capital: *British and American Trustee and Finance Corporation* v. *Couper* (1); and as to the period of limitation in such a case there appears to be no reported decision. But it is submitted that in the case of capital and also in the case of dividends the period of limitation is six years.

On the delaration of a dividend a debt, immediately payable, is due to each shareholder, and the Statute of Limitations commences to run, but the company is not in the position of a trustee for the shareholders: *In re Severn and Wye and Severn Bridge Ry. Co.* (2) In that case it was unnecessary to decide whether the period of limitation was six or twenty years, as more than twenty years had expired.

[*Frank Evans*, amicus curiæ, cited *In re Drogheda Steam Packet Co.* (3)]

The decision in that case rather turns on the effect of the articles of association of the company, and, moreover, is not binding on this Court. In *Smith* v. *Cork and Bandon Ry. Co.* (4) the claim was held to be founded upon a specialty.

There is no doubt about the right to sue for dividends declared: *Dalton* v. *Midland Counties Ry. Co.* (5); or other sums belonging to shareholders in the hands of a company: *Moseley* v. *Cressey's Co.* (6); *Moore* v. *Garwood* (7); *Johnson* v. *Goslett.* (8)

The principle of those cases applies to the sums payable as

(1) [1894] A. C. 399, 414.
(2) [1896] 1 Ch. 559.
(3) [1903] 1 I. R. 512.
(4) (1870) I. R. 5 Eq. 65.
(5) (1853) 13 C. B. 474.
(6) (1865) L. R. 1 Eq. 405.
(7) (1849) 4 Ex. 681.
(8) (1856) 18 C. B. 728.

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returned capital to the shareholders. The fact that the share certificates are under seal, or that they refer to the articles, does not make the company liable under a specialty to the shareholders. The certificate is not a deed because it is under the seal of the company; and the articles of association, although s. 16 of the Companies Act, 1862, require them to be stamped as a deed, and provides that certain debts due from a member to the company shall be specialty debts, are not a contract with the individual members.

[BYRNE J. referred to *Allen* v. *Gold Reefs of West Africa*. (1)]

It cannot even be said that all debts due from a shareholder to the company are specialty debts. [He also referred to *Eley* v. *Positive Government Security Life Assurance Co.* (2); Buckley on Companies, 8th ed. p. 215.]

H. Greenwood, for the respondents. The case is on all-fours as regards the dividends with *In re Drogheda Steam Packet Co.* (3)

As regards the returns on capital the company has constituted itself a trustee of the unpaid returns for the shareholders. In *In re Severn and Wye and Severn Bridge Ry. Co.* (4) notice had not been given to the shareholders that assets were held for them.

Moreover, the shareholders are in the position of partners, who are certainly not statute-barred because they do not draw out their shares of profits or assets for six years: *Barton* v. *North Staffordshire Ry. Co.* (5) [He also referred to *In re Wakefield Rolling Stock Co.* (6); *In re Cornwall Minerals Ry. Co.* (7)]

Whinney, in reply.

BYRNE J. (after stating the facts). The liquidator is anxious to know whether he can distribute a sum of about 900*l.* in his hands which would have been distributed if the non-claiming shareholders had come forward. One shareholder has been

(1) [1900] 1 Ch. 656.
(2) (1876) 1 Ex. D. 88.
(3) [1903] 1 I. R. 512.
(4) [1896] 1 Ch. 559.
(5) (1888) 38 Ch. D. 458, 463.
(6) [1892] 3 Ch. 165.
(7) [1897] 2 Ch. 74.

appointed to represent the class of shareholders who did not come in, and counsel on their behalf has argued that the liquidator acting on behalf of the company cannot divide this money among those only of the shareholders who are known, as surplus assets, after all their capital has been returned, but that although he can in due time rely on the Statute of Limitations, the statutory period is twenty years, and that it has not yet elapsed.

The other question, with which I will deal first, is in respect of dividends declared but not claimed.

As regards unclaimed dividends the authorities seem to be now clear that the statutory period is twenty years, and that there is no power to deal with them before the expiration of that period otherwise than by payment to the holders of the shares in respect of which they were declared.

Among the cases referred to as to dividends is the decision of the Court of Appeal in Ireland in *Smith* v. *Cork and Bandon Ry. Co.* (1) There the company, having a fund in hand applicable as revenue, declared a dividend out of it in favour of its ordinary shareholders, without providing for an arrear of dividend due on its preference shares.

An injunction was sought to restrain the payment of the proposed dividend without regard to the right of the preference shareholders. An objection for want of parties was overruled, and it was held that the preference shareholder was a specialty creditor. Besides the question whether his claim was in respect of a specialty, there was another question, namely, whether the company was in the position of a trustee towards its shareholders so as to prevent the Statute of Limitations from running. Christian L.J. says (2): "I am aware that there have been cases in which, for some purposes, directors of joint stock companies have been *assimilated* to trustees—as, for example, in the not permitting them to make their office a source of private profit—but that they are *actually* trustees, for each individual shareholder, still more, that, by reason of such supposed trusteeship, the company are to lose the ordinary protection of the Statute of Limitations, is a

(1) I. R. 5 Eq. 65. (2) I. R. 5 Eq. 76.

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proposition which presents itself to my mind with all the effect of novelty, and as to which I shall not say more at present than that I reserve my opinion upon it until the question shall arise. For the truth is, that the facts of this case do not raise any question of the statute at all. The claim resting on a specialty, the limitation is, of course, twenty years; and the earliest instalment of the arrear (December, 1853) falls within that limit."

The Court of Appeal was, I think, quite clear in that case, that as to the declared dividend there was no relation of trustee and cestui que trust between the company and the individual shareholders to prevent the Statute of Limitations from running. There is also incidentally the statement that in such a case the statutory period of limitation is twenty years.

In *In re Severn and Wye and Severn Bridge Ry. Co.* (1) Romer J. had to deal with the case of dividends declared on ordinary shares more than twenty years before the claims to the dividends were made; he did not have to say whether the period of limitation was twenty years or otherwise. But as regards the alleged existence of a trusteeship he says: "The declaration that the dividend was payable did not make the company a trustee of it for the shareholders."

The latest case is *In re Drogheda Steam Packet Co.* (2) The head-note of that case is as follows: "Dividends on ordinary shares in a company had been declared and became payable more than six and less than twenty years before the claims for them were made by the shareholders:—*Held*, that the share certificates, as governed by the articles of association, constituted a specialty debt, and that consequently the arrears of dividend were recoverable after the lapse of six years." In that case the Master of the Rolls deals with *In re Severn and Wye and Severn Bridge Ry. Co.* (1), and points out that Romer J. has disposed of the contention that there is any relation of trustee and cestui que trust, founding his decision to some extent on *Smith* v. *Cork and Bandon Ry. Co.* (3) Then, after referring to *In re Cornwall Minerals Ry. Co.* (4), in

(1) [1896] 1 Ch. 559,-565.
(2) [1903] 1 I. R. 512.
(3) I. R. 5 Eq. 65.
(4) [1897] 2 Ch. 74.

which twenty years was held to be the period of limitation in the case of a debenture-holder, the Master of the Rolls says (1): "In what respect, then, is there a difference in principle between the case of a debenture-holder and that of a shareholder who has got a contract under seal, where a dividend is declared and there is a fund available to pay him? Of course, debenture-holders have a priority, as creditors. But, coming back to *Smith* v. *Cork and Bandon Ry. Co.* (2), in my opinion it cannot be distinguished in principle from the present case, and governs it if it is a right decision, although it was a case not of ordinary but of preference shares." Then the Master of the Rolls refers to the judgment of Christian L.J., pointing out that he had "held that claims on preference shares were payable as a specialty debt"; and then he says: "Is there a distinction in the case of an ordinary shareholder? The dividends in each case are payable out of the same fund, but the preference shareholders come first. There is first an ascertainment of profits, and if there is a sufficiency of profits the preference shareholder gets the whole of his dividends. If there is not, he only gets a portion. But if there is more than enough to pay the preference shareholders, then the surplus becomes distributable among the ordinary shareholders. They are paid out of exactly the same profits, and in exactly the same way. If that is so, it would be a very curious result if, of two dividend warrants sent to a shareholder on the same day—one for preference, and one for ordinary, shares in the same form—and payable out of the same fund, one should be barred by non-payment of arrears after six years, and the other should not be barred till after the lapse of twenty years."

It is quite clear to my mind that although the case just referred to and *Smith* v. *Cork and Bandon Ry. Co.* (2) are not binding on me, it would require very weighty arguments to induce me to refuse to follow them. The only distinction between those cases and the case before me which can be fairly suggested is that in the case of preference shares there is a statement on the share certificate that the shareholder is entitled to a certain dividend, and that in the case of ordinary shares the certificate

(1) [1903] 1 I. R. 516. (2) I. R. 5 Eq. 65.

BYRNE J. 1904 ARTISANS' LAND AND MORTGAGE CORPORATION, *In re.*

only refers to the articles of association. In my judgment that makes no difference which can be relied on as distinguishing the cases in principle.

Then I come to the other point, as to th return of capital. I cannot fairly distinguish between the two claims in respect of the application of the statute to income and capital. Analogies have been suggested and authorities referred to with reference to cases arising out of partnerships. But the same considerations seem to apply to undrawn dividends out of profits and unpaid returns of capital, which, in my judgment, stand upon the same footing. When you have to consider the question of dividends and unpaid returns of capital the shareholders' claims depend in each case on their rights which arise out of the articles of association referred to in the certificates, under the seal of the company, of shares. If the decisions are right, and, in my judgment, they are right, that the dividends are due under a specialty, the same principle appears to me to apply in the case of returns of capital; and, therefore, the period of twenty years is the period of limitation.

It is unnecessary to decide the question as to there being some kind of distinction whereby the unreturned capital might be regarded as a trust fund, for this fund clearly is not divisible now.

Solicitors: *E. C. Rawlings & Butt.*

F. E.

In re LAKE GEORGE MINES, LIMITED.

BYRNE J.

1904

Feb. 9.

[0028 of 1901.]

Company—Winding-up—Official Receiver—Duty as to giving Information to outside Liquidator—Companies (Winding-up) Rules, 1903, *rr.* 53, 144.

Information obtained by the official receiver from officers of the company under rule 53 of the Companies (Winding-up) Rules, 1903, is not "property" of the company within rule 144 (1), or "information respecting the estate and affairs of the company .... necessary or conducive to the due discharge of the duties of the liquidator" within the meaning of rule 144 (3), which it is the duty of the official receiver to produce to a liquidator superseding him as liquidator.

Quære, whether the Court on sufficient evidence may not direct the official receiver, as its officer, to disclose the information to an outside liquidator.

On February 6, 1901, an order was made for the winding-up by the Court of a company called the Lake George Mines, Limited.

Shortly afterwards the official receiver had, in accordance with the usual practice, interviews with directors and officers of the company with reference to the affairs of the company, and had in his possession notes and memoranda of what passed at these interviews, comprising a large number of documents on the official receiver's private file on which were based his observations to shareholders and creditors of the company and his reports to the Court.

Subsequently Mr. Robert Warner (who was not one of the official receivers) was appointed liquidator of the company.

Mr. Warner commenced in the name of the company an action against certain directors and other persons, some of whom were among the persons with whom the official receiver had had interviews.

In January, 1904, the solicitors of the liquidator wrote to the official receiver informing him that the trial of the action had been fixed for February 15, and stating that they had been advised by counsel to call upon the official receiver to inform them who were the officers of the company who attended

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before the official receiver and furnished the information upon which his report and observations were based, what the nature of that information was, and, if in writing, for permission to inspect and make copies of the same and of any memoranda made by the official receiver's department in respect of any information so supplied.

The official receiver replied that he had in his possession a number of notes and memoranda of interviews with the secretary and officers of the company—some of which only were signed; that they had been made for his personal use, and that it was not the practice of his department to use such notes and memoranda against defendants in proceedings for misfeasance; and that he declined to produce the notes and documents except under an express order of the Court after both parties to the action had been heard. The liquidator then by summons applied for an order that the official receiver should hand over to him the original notes or memoranda of interviews with the secretary and officers of the company, whether signed or not, and any other document or documents or papers in his possession relating to the company, or in the alternative that the official receiver should be ordered to supply to the liquidator or his solicitors copies of such notes and memoranda or other documents and papers.

The summons was adjourned to Byrne J., and heard by him in chambers on February 9, 1904.

The applicant was represented by his solicitors.
R. J. Parker, for the official receiver.

BYRNE J. This is a very important application. It has been argued before me as a matter of principle whether, where, as in this case, a liquidator has been appointed in the place of the official receiver, the official receiver is bound to hand over or produce to the liquidator all documents which have come into his possession as official receiver. It is admitted that the documents in respect of which this application is made have come into existence and into the official receiver's possession while he was exercising his powers under what is now

rule 53 (2) of the Companies (Winding-up) Rules, 1903, which is as follows: "The official receiver may from time to time hold personal interviews with every such person for the purpose of investigating the company's affairs, and it shall be the duty of every such person to attend on the official receiver at such time and place as the official receiver may appoint and give the official receiver all information that he may require." From the information thus obtained, the official receiver, acting in that capacity, prepares a report for the Court. This information is not given on oath, and it has been stated before me that it has never been the practice to use the information on misfeasance proceedings, although the information has sometimes been made use of in public examinations where the person under examination has been asked whether he has not previously made an inconsistent statement to the official receiver.

The duty of the official receiver on the appointment of another person as liquidator is pointed out in rule 144, which provides, by sub-rule 1, that "the official receiver shall forthwith put the liquidator into possession of all property of the company of which the official receiver may have custody"; and, by sub-rule 3, that "it shall be the duty of the official receiver, if so requested by the liquidator, to communicate to the liquidator all such information respecting the estate and affairs of the company as may be necessary or conducive to the due discharge of the duties of the liquidator." The documents in the present case are clearly not the property of the company within the meaning of rule 144 (1). They have come to the hands of the official receiver by virtue of his official position as official receiver, so that rule 144 (3) is the only provision, if there is any, under which the liquidator could require the production of the documents in question. No evidence has been adduced in support of the application, and I have no material before me enabling me to say that it is necessary or conducive to the discharge of the liquidator's duties that he should have the information afforded by these documents. In the absence of evidence, I cannot say whether this is a case in which the Court might in its discretion direct its officer, the

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official receiver, to produce or hand over the documents to the liquidator. Such a direction might perhaps be given on an application supported by sufficient evidence.

Another point, to which, perhaps, reference should be made, is that the person bringing the action may subpœna the official receiver to attend as a witness at the trial and produce documents in his possession. But, on the other hand, it must be remembered that the person subpœnaed may claim privilege as an officer of a public department, on the ground that production will be contrary to public interest, or as an officer of the Court.

I cannot say that the official receiver has not complied with rule 144 (3). There appears to be no reason for acceding to the application, and I dismiss it with costs.

I give leave to appeal, and as the matter is one of urgency, inasmuch as the action is very shortly coming on for trial, I will certify that I do not require any further argument.

[An appeal was brought, but, the appellant not appearing, was dismissed with costs.]

Solicitors for applicant: *H. G. Campion & Co.*

Solicitor for official receiver: *Solicitor to the Board of Trade.*

F. E. (ex relatione Mr. R. J. PARKER).

In re GRIFFITH. JONES *v.* OWEN.

[1900 G. 1441.]

FARWELL J.

1904

April 13.

Practice—Administration—Costs—Order to pay Costs out of Fund in Court—Insufficient Fund—Priority of Administrator's Costs.

An order on the further consideration of an administration action that the costs of all parties are to be paid out of a fund in court does not amount to a direction that they are to be paid equally. If the fund turns out insufficient to pay all the costs, the costs of administrators must be paid in priority to those of other parties.

Gaunt v. *Taylor*, (1843) 2 Hare, 413; 62 R. R. 164, followed.

Swale v. *Milner*, (1834) 6 Sim. 572, not followed.

THIS was an action brought by one of the next of kin of Catherine Harriett Griffith, who died a spinster and intestate on February 21, 1899. Letters of administration had been granted to the three defendants on June 2, 1899. The action was commenced by originating summons on July 4, 1900. Two of the defendants, Jane Owen and Ann Pugh, who had been the active parties in administering the estate, appeared, and defended separately from the third, J. R. Griffith. An order for administration was made on January 14, 1901. By the order made on further consideration on July 15, 1903, it was ordered that the costs of the plaintiff and defendants and certain persons attending the proceedings should be taxed as between solicitor and client, including in the costs of the defendants their costs, charges, and expenses, and their costs of two other actions relating to the estate, and that the defendants Jane Owen and Ann Pugh should be at liberty to retain their costs, when taxed, out of a balance found due from them of 131*l.* 7*s.* 1*d.*, if sufficient for that purpose, and if insufficient to retain the same on account of their costs, and to pay the residue (if any) into court. And it was ordered that the funds in court, which amounted to 432*l.* 0*s.* 6*d.*, should be dealt with as directed by the schedule. The schedule directed payment of a debt of 119*l.* 1*s.*, payment of the costs to be taxed under

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the order, and division of the residue among the eight persons, including the plaintiff and defendants, who were certified to be the intestate's next of kin.

The taxing master certified the costs of the plaintiff at 190*l.* 6*s.* 5*d.*, of the defendant J. R. Griffith at 204*l.* 2*s.*, and the defendants Jane Owen and Ann Pugh 319*l.* 3*s.*, leaving a balance of 187*l.* 16*s.* 5*d.* due to them after deducting the 131*l.* 7*s.* 1*d.* The parties having liberty to attend had appeared with one or other of the parties, so that there were no separate costs due to them. The fund in court being insufficient to pay the costs, the plaintiff took out this summons, asking that it might be divided among the parties rateably in proportion to the respective amounts of their taxed costs.

Cozens-Hardy, for the summons. The costs of all parties were ordered to be paid by the order on further consideration. That order cannot now be altered or varied, and must be carried out as nearly as can be by dividing the fund rateably: *Swale* v. *Milner*. (1)

Martelli, for the defendants Pugh and Owen. It is not a case of res judicata; the order on further consideration was no decision as to priority. *Swale* v. *Milner* (1) is inconsistent with the general principle of the Court, that legal personal representatives have a charge on the estate for their costs. *Gaunt* v. *Taylor* (2) and *Blenkinsop* v. *Foster* (3) are inconsistent with *Swale* v. *Milner*. (1) [He also referred to Williams on Executors, 9th ed. p. 851, and Morgan and Wurtzburg on Costs, 2nd ed. p. 201.

Cozens-Hardy, in reply. In *Blenkinsop* v. *Foster* (3) it is plain from the judgment of Alderson B. that the case was treated on the assumption that the question how the fund was to be dealt with, if insufficient, was specially reserved.

FARWELL J. The order made on further consideration in this case was made on the assumption that the fund in court would be more than sufficient to pay the costs, for it directs

(1) 6 Sim. 572. (2) 2 Hare, 413; 62 R. R. 164.
(3) (1838) 3 Y. & C. Ex. 205.

the distribution of the surplus. It is a well-settled rule of the Court that administrators have priority for payment of their costs out of their intestate's estate. The order in this case directed payment of the costs of all parties, but it turns out that the fund is insufficient to pay even the costs of the administrators. The only difficulty in the case is caused by the conflicting decisions of two learned Vice-Chancellors. In my own opinion there has been no decision in this case on the point of priority. I do not think that in the case of orders like this it is ever intended to decide what form any further order is to take. In ninety-nine cases out of a hundred it is not necessary to draw up an order to pay costs in the full form directing to whom each set of costs is to be paid and in what order, and I think the general direction to pay costs must be read as if it contained the words "in accordance with the rights of the parties," and not the words "equally" or "rateably."

There are three cases on the point, but as the case in the Exchequer may be open to Mr. Cozens-Hardy's comment, that it was decided upon the construction of the special order, I will put that case aside. Then we have two decisions which are in direct conflict. *Swale* v. *Milner* (1) was a creditor's action against the heir and administrator. There was an order directing the costs of all parties to be paid out of a fund in court, and it turned out to be insufficient. Shadwell V.-C. says: "The order on further directions, directed the costs of all parties to be paid: and I cannot vary that order. All that I can do is to direct a reference to the master to divide the fund, amongst all the parties, in proportion to their costs." With all respect, I should say in comment upon that judgment that the order did not direct the costs to be paid equally. It only directed payment to be made, leaving it open to the Court to direct the order of payment if necessary. I come therefore to the same conclusion as Wigram V.-C. did in *Gaunt* v. *Taylor* (2), in which he did not follow *Swale* v. *Milner*. (1) The facts were practically the same, but he says: "In the case of *Swale* v. *Milner* (1), the Court considered itself

(1) 6 Sim. 572. (2) 2 Hare, 413, 420; 62 R. R. 164, 169.

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to be bound by a similar order to apply the fund in payment of the costs rateably, where it proved to be insufficient to pay the whole of the costs in full, although the ordinary rule of the Court gave to some of the parties a priority over the others in respect of costs. The order of payment which I directed in the case of *Tipping* v. *Power* (1) was merely following the old rule of the Court. And, if that is the order in which the parties are entitled to the payment of their costs, and yet the Court is to be bound to apply the fund rateably, in consequence of the language of the prior direction, it follows that an effect is given to that direction which I cannot consider the Court to have intended,—for it involves a disposition of the fund (being deficient to pay all) which is not in accordance with the rights of the parties. Does the order which has been made force upon me the conclusion come to in *Swale* v. *Milner*? (2) I cannot say that I think the language of the order so stringent as that case supposes. If a fund were ordered to be paid to creditors, and some were creditors by specialty, and others by simple contract, and the fund proved to be insufficient to pay them all, I cannot think the Court would be bound to interpret an order, the language of which is plainly flexible, so as to contravene a well-established and undisputed rule of practice. I proceed upon the ground that the order merely amounts to a charge upon the fund in favour of the parties entitled, according to their admitted rights"; and then he adds: "I do not in this respect vary the order on further directions, I only give to it a specific interpretation consistent with the language in which it is expressed."

With every word of that I respectfully agree, and I shall follow *Gaunt* v. *Taylor*. (3) The administrators must have their costs paid in priority; but there are two sets of administrators' costs, and as between them the fund must be apportioned rateably.

Solicitors: *Robbins, Billing & Co., for C. W. Blaxland, Hythe; T. D. Jones, for D. Oswald Davies, Dolgelly.*

(1) (1842) 1 Hare, 405; 58 R. R. 113. (2) 6 Sim. 572.
(3) 2 Hare, 413; 62 R. R. 164.

J. R. B.

FARWELL J.
1904
April 13.

In re REPINGTON. WODEHOUSE *v.* SCOBELL.

[1904 R. 447.]

Settlement—Reversionary Share—Settlement of Part—Covenant for further Assurance—Legacy Duty—Right to Indemnity.

In all cases of assignment of reversionary interests the legacy duty which becomes payable on their falling into possession falls, in the absence of express contract, on the assignee.

Where the owner of a reversionary interest settles a part of it, there is no rule which throws the burden of the legacy duty upon the part retained, and a covenant for further assurance does not bind the settlor to indemnify the settled fund against legacy duty.

UNDER the will of Charles Edward Repington the testator's residuary personal estate was, at the date of the settlement hereinafter mentioned, held in trust for Charles Henry Wyndham a'Court Repington for life, with remainder to Charles a'Court Repington absolutely. The residuary estate consisted of 15,000*l.* on mortgage and 783*l.* 11*s.* Consols. Charles a'Court Repington, the settlor, by a settlement dated February 10, 1882, made on his marriage, after reciting that under the will of the said C. E. Repington the settlor was entitled in remainder or reversion expectant on the decease of his father to a mortgage debt of 15,000*l.* secured to the trustees of the will as therein mentioned, and that on the treaty for the said marriage it was agreed that the sum of 10,000*l.*, part of the said mortgage debt of 15,000*l.*, to which the said Charles a'Court Repington was entitled in reversion as aforesaid, should be assigned unto the trustees of the settlement upon the trusts therein mentioned; the said Charles a'Court Repington did thereby assign unto the trustees "all that sum of 10,000*l.*, part of the said mortgage debt or sum of 15,000*l.* to which the said Charles a'Court Repington is entitled as aforesaid in reversion expectant upon the death of his father, the said C. H. Wyndham a'Court Repington, and the interest and income of the said sum of 10,000*l.*," upon the trusts therein mentioned (being the

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usual trusts in favour of the said C. a'Court Repington and his intended wife and the children of the marriage); and the settlement contained an agreement in the following terms: "That he the said Charles a'Court Repington and every person claiming through or under him will at any time or times hereafter, upon the request of the trustees or trustee for the time being of these presents or any other person for the time being interested in the premises, and at the cost of the trust estate, execute and do every such assurance and thing for the further or more perfectly assuring the said premises hereinbefore expressed to be hereby assigned, or any part thereof, unto the trustees or trustee for the time being of these presents, and for enabling them or him to obtain payment of the same as by the persons or person making such request as aforesaid shall be reasonably required."

The settlor's father died on October 29, 1903. 5000*l.*, part of the 15,000*l.* mortgage, had been paid off during his lifetime and invested in Consols, and at the time of his death the 10,000*l.* remaining due upon the mortgage, and the Consols purchased with the 5000*l.*, formed the whole of the testator's residuary estate.

This summons was taken out by one of the trustees of the will for the determination of the question whether the legacy duty which became payable on the death of the settlor's father ought to be paid rateably by the settled sum of 10,000*l.*, and the 5000*l.*, part of the mortgage debt retained by the settlor, or to be borne wholly by the latter fund. Probate duty had been paid on the death of the testator, and legacy duty was the only duty payable.

Bryan Farrer, for the plaintiffs, trustees of the will.

MacSwinney, for the trustees of the settlement. If the reversionary fund had been subject to a mortgage, and the settlor had sold or settled part of it, and given a covenant for further assurance, he would clearly have been bound to discharge the mortgage out of the part he retained: *In re Jones*. (1) Legacy duty is not, strictly speaking, a charge

(1) [1893] 2 Ch. 461.

upon the fund, but it is a payment for which the whole fund is liable, and ought to be dealt with on the same principle as a charge. If the whole fund were settled, the duty would have to be paid out of it, but the settlor's retaining a part makes him liable under his covenant.

On the true construction of the settlement it was intended to settle a clear sum of 10,000*l.* charged upon the mortgage; any decrease of value would have to be borne by the unsettled share.

Romer, for the settlor and his mortgagee. The admission that if the whole fund had been settled is fatal to the argument that the whole of the legacy duty must be thrown on the share kept out of settlement. Legacy duty is not an incumbrance: *Bliss* v. *Putnam*. (1) When a reversion is sold the legacy duty falls on the purchaser.

In cases of successive appointments each appointee has to pay the legacy duty on the sum appointed to him; it is not thrown on the last appointed or unappointed shares: *In re Shaw*. (2)

On the construction of this deed the 10,000*l.* settled is a part of the mortgage debt, not a charge upon it. The covenant for further assurance only binds the settlor to give further assurance at the cost of the settled fund; it is plain he was not intended to incur any personal liability.

FARWELL J. In my opinion the 10,000*l.* must bear its own share of the duty. On the construction of the settlement the settlor has assigned a specific portion of the mortgage debt. He has not settled 10,000*l.*, a sum in cash charged upon or to be raised out of the larger sum of 15,000*l.*, but has assigned 10,000*l.*, part of the 15,000*l.*—in other words, two-thirds of the mortgage debt to which he was entitled; and it is assigned in terms as a reversion, to which the settlor is entitled expectant on the death of his father. Had it been an assignment of the whole sum of which he was entitled to the reversion, it is obvious, and counsel for the trustees properly admitted, that the duty would be borne by the assignee. It was next argued

(1) (1843) 7 Beav. 40. (2) [1895] 1 Ch. 343.

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that the covenant for further assurance throws the burden upon the share kept out of settlement. In my opinion, that is not so. I do not think that that covenant has any bearing on the case, for I do not think that legacy duty can be regarded as an incumbrance, properly so called. The case is clearly distinguishable from that before North J. That was the case of a mortgage which was an incumbrance, and the Court held on the construction of the particular covenant that, when a man had assigned for value without reference to any mortgage at all, he was bound under this covenant to discharge the mortgage. If, however, the assignment had been made subject to the mortgage, it is clear that no such question would have arisen; and when a vendor or settlor assigns an interest which is on the face of it a reversion, both parties know that duty is payable, and the assignment is implicitly made subject to duty. So much so that it has been held (1) that a purchaser is bound to covenant to indemnify his vendor against succession duty when it becomes payable. At any rate, there is no sort of deception in the matter. When the assignment is an assignment of a reversion as a reversion all parties know that it is subject to duty, and the duty that is payable is in proportion to the amount of the legacy. The whole legacy is 15,000*l.*, and it appears to me that it would be a distortion of the rights of the parties to cast the whole burthen in respect of the 15,000*l.* on the 5000*l.*, part of it, and I can find no ground for so holding. The result is that the 10,000*l.* must bear its own share.

Solicitors: *Nicholl, Manisty & Co.; Ellis & Ellis.*

(1) See Dart on Vendors and Purchasers, 6th ed. p. 668.—J. R. B.

J. R. B.

In re LETHEBY & CHRISTOPHER, LIMITED.

BUCKLEY J.

1904

April 15.

Company—Rectification of Register—Transfer of Shares—Refusal to register —"Usual Common Form" — Address of Transferor — Distinguishing Number of Shares.

Directors cannot under articles of a company which provide that any member may transfer his shares, "but every transfer must be in writing and in the usual common form," refuse to register a transfer because it omits particulars which would be found in a common form but are in the circumstances immaterial.

THIS was a motion by Mr. E. J. Jones asking that the company, Letheby & Christopher, Limited, by its directors or secretary might be ordered to register a transfer of one share in the company to him.

The company was a private one, and all the shares except eight were held by two persons. Miss E. V. Isley had signed the memorandum of association for one share, and she was therein described as of Dorman's Park Hotel, Dorman's Park, Surrey, spinster. She was on the register in respect of this share. The share was fully paid. She held no other share and never had held any other. This share she agreed to sell to Mr. Jones, and on March 22 she executed a transfer of it to him. This transfer did not contain her address nor the distinguishing number of the share. Mr. Jones sent the transfer to the company for registration, together with the certificate for the share, and a letter in the following terms: "Inclosed herewith please find certificate No. 8 for one share in your company, No. 5998, together with transfer duly executed from Miss Edith V. Isley to myself, and I shall be glad to receive a new certificate to myself at your convenience." In the certificate and in the register of shareholders Miss Isley was described as of Dorman's Park Hotel, Dorman's Park, Surrey.

The secretary of the company stated in his affidavit that the directors and himself knew that she had left that address, and that they did not know her address at the time of the transfer. The directors declined to register the transfer on the ground

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that it was not in the usual common form, as required by art. 25 of the company's articles of association, inasmuch as it did not contain the number of the share nor the address of the transferor. By art. 25 any member might transfer his shares, "but every transfer must be in writing and in the usual common form, and must be left at the office of the company accompanied by the certificate of the shares to be transferred, and such other evidence (if any) as the directors may require to prove the title of the intending transferor." Art. 28 was as follows: "The directors may in their discretion and without assigning any reason therefor refuse to register the transfer of any share (not being a fully paid-up share) to any person whom they shall not approve as transferee. The directors may also refuse to register any transfer of shares whether fully paid-up or not on which the company has a lien, or of any shares which the holder has agreed with the company to hold for a period not then expired."

Astbury, K.C., and *G. F. Hohler*, for the motion. The applicant is entitled to have the transfer registered. The only power of the company to refuse registration is under art. 28, which does not apply to this share. Therefore the sole question is whether the transfer is in usual common form within art. 25. Everything has been done regularly. The company knew Miss Isley's address and the number of her share; and it is ridiculous to suppose that there can have been an intention to make transfers void for any trifling omission of this sort.

Beddall, for the company. The application is premature, for there has been no unnecessary delay; but the company do not press that point. It is the universal custom to insert in transfers the address of the transferor and the numbers of the shares transferred. The address is required in order to enable the company to give to the transferor notice that they have received the transfer. We knew that Miss Isley had left the address given in the register of members, and we did not know her present address.

[BUCKLEY J. She would have to insert in the transfer the

same address as appeared in your books, or you would not have accepted the transfer.]

Still the transfer is not in common form because it contains no address.

Further, the transfer ought to have given the number of the share. It may be that the directors knew what the number was, but that does not affect the form of the transfer.

[BUCKLEY J. referred to *Bishop's Case* (1) and *Ind's Case.* (2)]

We do not say that a transfer without the number would not pass the share, but that it is not in usual common form.

Astbury, K.C., was not called upon to reply.

BUCKLEY J. stated the facts, and continued:—Under the articles the directors have power to refuse registration if the share transferred is not fully paid or the company have a lien upon it. This is a fully paid share, and there is no claim to a lien. Therefore they cannot refuse registration under art. 28. Sect. 22 of the Companies Act, 1862, makes shares freely transferable subject to the regulations. It is important that that free right of transfer should be preserved. With that view the Court will look at the regulations of the company, and, unless they forbid it, compel the directors to give effect to transfers. Miss Isley had a right to transfer this share to Mr. Jones, provided she complied with art. 25. All that that required was that the transfer should be in writing and in the usual common form. This transfer is in writing, and the only suggestion is that it is not in the usual common form because it is wanting in two particulars, namely, (1.) that the transferor is not described by her address, and (2.) that the share is not described by its denoting number. Miss Isley was a person who subscribed the memorandum of association for this one share, and she is there described as of Dorman's Park Hotel, Dorman's Park, Surrey, spinster. She is described on the register of members and in the share certificate by the same address. With the transfer the transferee sent the certificate. He wrote that he inclosed herewith "certificate No. 8 for one share in your company, No. 5998, together with

(1) (1869) L. R. 7 Ch. 296, n. (2) (1872) L. R. 7 Ch. 485.

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transfer duly executed from Miss Edith V. Isley to myself." Therefore he sent with the transfer the certificate which contained the transferor's address. There was not the smallest doubt who the transferor was, for she only held the one share, and she was the person described in the memorandum of association and certificate. The next objection is that no denoting number was given on the transfer. There again no difficulty arises, for she held no share other than the share numbered 5998, and the certificate of that share was sent with the transfer. It is said that by reason of these defects the provisions of the articles were not complied with, and the transfer was not in the usual common form. In my judgment the absence of the address and of the number of the share was, in the circumstances of this case, wholly immaterial. As to the address: the object of giving the address is not, as suggested, to enable the directors to communicate with the transferor, but to identify the transferor with the person on the register. As to the denoting numbers of the shares: in *Ind's Case* (1) it was said by Mellish L.J. that the numbers of shares are simply directory for the purposes of enabling the title of particular persons to be traced, and that if a shareholder, having the number of shares which he professes to transfer, puts by mistake the wrong numbers in the transfer, that will not prevent his shares passing by the transfer. In *Bishop's Case* (2) Selwyn L.J. said that where there was no doubt whatever either of the numbers of the shares intended to be assigned, or of the intention of the assignee to accept the shares, the circumstance of the numbers being inserted after the execution of the transfer was perfectly immaterial. Therefore the number of the share is directory only, and, if there is no other share belonging to the same member, his share will pass by a transfer which does not give the number. Even if a wrong number is given, yet if it is clear that the transferor must have meant to deal with a particular share, the absence of the number is immaterial. Is a transfer not in the usual common form because it omits matters which would be found in a common form but which in the circumstances are wholly

(1) L. R. 7 Ch. 485. (2) L. R. 7 Ch. 296, n.

immaterial? In my judgment it is not. Art. 25 means that everything which is material to the transfer must be in the usual common form. It does not mean that the transfer is bad if the i's are not properly dotted and the t's are not properly crossed. Under the circumstances I think Mr. Jones is entitled to have the transfer registered, and I make the order which is asked for. As a matter of form I will join Miss Isley as a co-applicant.

Solicitors: *A. W. Bartlett; G. H. Daniell.*

H. C. R.

In re GLASDIR COPPER WORKS, LIMITED. ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER WORKS, LIMITED.

[1901 G. 116.]

Lease—Tenant's Fixtures—Removal—Determination of Lease by Forfeiture—Mortgage of Lease—Right of Mortgagee.

A lease to a limited company contained a proviso for the determination of the term in the event of the company going into liquidation. The company having issued debentures which constituted a floating charge on all its property present and future, a receiver was appointed in a debenture-holders' action. The receiver took possession of the leasehold premises and obtained leave from the judge to sell the tenant's fixtures, the lessor being present and not objecting. After the fixtures had been advertised for sale the company went into voluntary liquidation, and the lessor thereupon demanded possession of the leasehold premises including the fixtures in question:—

Held, that the voluntary act of the company in going into liquidation ought not in the circumstances to prejudice the right of the debenture-holders to remove the tenant's fixtures, and that they were entitled to a reasonable time after the determination of the lease for removal.

Pugh v. *Arton*, (1869) L. R. 8 Eq. 626, commented on.

MOTION.

The question in this case was whether certain tenant's fixtures were removable by a mortgagee of the lessee after the lease had been determined by forfeiture.

In June, 1896, the defendant company, then known as the Hurst Mines, Limited, issued debentures which charged with the payment of the moneys advanced its undertaking and all

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its property whatsoever and wheresoever both present and future, and these debentures were declared to be a floating security.

On July 8, 1896, the company took a lease from Mr. John Vaughan of a copper mine situate at Glasdirissa, Merionethshire, and the lease provided that in the event, among other things, of the company going into liquidation the term should cease, determine, and be void to all intents and purposes, but not as regards the right, power, and authority of the lessor to enforce the due performance of the covenants therein contained on the part of the company, and there was also a power to re-enter. On June 27, 1900, Vaughan died, leaving his widow his sole executrix, and by his will the reversion on the lease became vested in her. Subsequently the present action was commenced by the debenture-holders to enforce their charge, and by an order made in this action on February 8, 1901, a receiver and manager was appointed of the undertaking of the company and of all its property present and future. On June 25, 1903, a petition to wind up the company was presented, but no order was made upon it. On July 13, 1903, an application was made by summons in this action on behalf of the debenture-holders that the plant therein mentioned, being the fixtures in question, might be sold by the receiver, and that he might be at liberty to remove the same from the premises of the defendant company. That summons came before the master on several occasions, and ultimately Mrs. Vaughan was served and appeared by her solicitor. The summons was disposed of on August 20 in the presence of her solicitor, and leave was then given to the receiver to sell the fixtures in question, it being expressly stated in the order that Mrs. Vaughan claimed no interest therein. On October 16, the company passed an extraordinary resolution for its voluntary winding-up. After this the receiver, acting under the order of August 20, issued advertisements for the sale of the fixtures on November 26, and this fact was known to Mrs. Vaughan.

On November 13 Mrs. Vaughan's solicitor wrote to the receiver demanding, on behalf of his client, delivery of possession of the premises comprised in the lease.

On November 14 a reply to this letter was sent by the firm of which the receiver was a member to the effect that the receiver was not in the City on that day, but that he was expected there on Monday, November 16, when the matter would receive his attention.

On November 17 Mrs. Vaughan served the plaintiffs and defendants in this action with notice of the motion which was now before the Court. The notice of motion asked that an inquiry might be made whether the applicant had any and what interest in the Glasdirissa mines and the buildings and fixtures thereon taken possession of by the receiver under the order of February 8, 1901, and that the receiver might be directed to deliver up possession of the said lands, mines, buildings, and fixtures, or that the applicant might be at liberty to commence proceedings against the receiver to recover possession of the premises, and that the receiver might be directed not to sell or offer for sale or remove the fixtures whether the same were or were not prior to the determination of the lease tenant's fixtures, or that the applicant might be at liberty to commence proceedings against the receiver to restrain him from selling or offering for sale or removing any such fixtures.

This motion came before Joyce J. on November 20, 1903, when it was ordered that it should stand over for a week, the plaintiff company undertaking that none of the fixtures should be removed or sold in the meantime; and this undertaking was continued from time to time until the hearing of the motion. The only question now in dispute was as to the right of the applicant to the tenant's fixtures in the possession of the receiver.

A. F. Peterson, for the applicant. Tenant's fixtures must be removed during the continuance of the term, or within such time afterwards as the tenant may properly consider himself the tenant of the landlord: *Weeton* v. *Woodcock* (1); *Pugh* v. *Arton* (2); *Barff* v. *Probyn*. (3)

(1) (1840) 7 M. & W. 14; 56 R. R. 606.
(2) L. R. 8 Eq. 626.
(3) (1895) 73 L. T. 118.

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Frank Wright (*Hughes, K.C.*, with him), for the debenture-holders. Whatever may be the rule as to tenant's fixtures as to which there is no agreement to remove, where there is an agreement in the lease that the tenant shall be at liberty to remove such fixtures, that gives him a reasonable time after the expiration of the lease within which to remove: Fawcett's Landlord and Tenant, 2nd ed. p. 493; and it is submitted that it is immaterial whether the agreement is in the lease or elsewhere. In this case the order made by the master amounted to an agreement by the applicant that the receiver should be at liberty to remove the fixtures in question. Further, the company, by voluntarily going into liquidation, cannot prejudice the right of its mortgagees to remove the fixtures. It is settled that a surrender by a lessee cannot affect the rights of third parties, and therefore a mortgagee of tenant's fixtures still retains the right to enter and remove them notwithstanding the surrender, provided that he does so within a reasonable time: Fawcett's Landlord and Tenant, 2nd ed. pp. 460–1; *Saint* v. *Pilley*. (1) The same principle applies to this case. Assuming that the receiver is allowed a reasonable time for removal, the time does not begin to run from the date of the resolution for winding-up, for a proviso that a lease shall become void in the event of a winding-up is construed as meaning only that it shall become voidable at the option of the lessor. The time, therefore, begins to run only from the time when that option is notified to the lessee.

A. Adams, for the receiver, adopted the foregoing argument.

A. F. Peterson, in reply. The order of the master cannot be construed as an agreement by the applicant; it is merely an admission by her that at that date she had no interest in the mortgaged premises.

Cur. adv. vult.

March 19. JOYCE J. The question in this case is with reference to certain trade fixtures—that is to say, certain articles which though annexed to the soil did not thereby become the property of the owner of the freehold, but were

(1) (1875) L. R. 10 Ex. 137.

removable by the tenant. The question I have to decide is whether these articles may be removed by a purchaser or mortgagee from the lessee after the lease has been determined by forfeiture. [His Lordship stated the facts substantially as above set out, and observed that the proviso for the termination of the lease in the event of a winding-up only meant that the lease should become voidable at the option of the lessor, and required that the lessor should do some unequivocal act notified to the lessees indicating her intention of availing herself of the option, and he came to the conclusion that the lease was not determined until the receipt of the letter of November 13. He then continued as follows:—]

The applicant's contention is that, the receiver not now holding the premises under a right still to consider himself as tenant, the words used in *Weeton* v. *Woodcock* (1) and *Mackintosh* v. *Trotter* (2), the landlord was entitled to re-enter, and that the interest of the receiver and of the debenture-holders is at an end. Upon the rule laid down by those two cases, I observe that Thesiger L.J., in delivering the judgment of the Court of Appeal in *Ex parte Brook* (3), says: "It is not easy to define precisely what was meant by the propositions to which we have just referred, and we observe, that as regards the rule laid down in *Weeton* v. *Woodcock* (4), the difficulty which we feel in understanding its exact meaning was shared in by the Court of Common Pleas, as stated by Willes J. in delivering the judgment of that Court in *Leader* v. *Homewood.* (5)" He goes on to say: "It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such

(1) 7 M. & W. 14; 56 R. R. 606.
(2) (1838) 3 M. & W. 184; 49 R. R. 565.
(3) (1878) 10 Ch. D. 100, 109.
(4) 7 M. & W. 19; 56 R. R. 609.
(5) (1858) 5 C. B. (N.S.) 546, 553.

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reasonable time as last referred to, the law would presume a right to remove tenants' fixtures after the expiration or determination of the tenancy." Then he says that the case before them is a different case, and that at all events the rule does not apply to that case.

Now, for the purpose of determining the question here, it appears to me that I have not to decide whether, as is stated in some of the books, or as is suggested by North J. in *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (1), no property at all in the fixtures vests in the landlord until the term comes to an end, or whether the property in the fixtures does sub modo vest in the landlord when they are affixed, and the tenant retains only a power coupled with an interest. However this may be, it is well settled that where the tenant, the lessee, surrenders his interest to the landlord, that does not deprive a mortgagee or purchaser from the lessee of the rights he then possessed in reference to fixtures situated as these are, and that he still retains the right to remove them during a reasonable time. The authorities for that are *London and Westminster Loan and Discount Co.* v. *Drake* (2) and *Saint* v. *Pilley* (3), and there are other cases. Here the passing of the extraordinary resolution was a voluntary act on the part of the lessees in which the mortgagees did not concur, and therefore the passing of such resolution, in my opinion, did not vest the absolute property in chattels belonging to the mortgagees in the reversioner or take away the power of the mortgagees to remove the chattels any more than such power or such right, whatever it may be, would be taken away in the case of the surrender of a lease by the lessee.

I was properly pressed with the case of *Pugh* v. *Arton* (4), before Malins V.-C., where it was held, according to the head-note, that in the absence of special contract tenant's fixtures cannot be removed after the termination of the lease—whether the lease determines by effluxion of time or by re-entry on forfeiture. In my opinion that head-note goes beyond the

(1) [1892] 1 Ch. 415.
(2) (1859) 6 C. B. (N.S.) 798.
(3) L. R. 10 Ex. 137.
(4) L. R. 8 Eq. 626.

decision, and is not in accordance with the law. It may be very true so far as concerns a power to remove by the tenant himself, though I trust that the Court of Appeal, whenever the case comes to be discussed there, may come to a different conclusion in reference to the result of a determination of the lease by forfeiture. But at all events the decision in *Pugh* v. *Arton* (1) has nothing to do with the case of a mortgagee or purchaser from the tenant before the forfeiture accrues; and in that particular case the person who was claiming the fixtures, and whose claim was disallowed, was a person whose only claim was as a volunteer, the claim being under and by virtue of an assignment from the lessee, which assignment was in itself the act of forfeiture.

In my opinion the authorities enable me to decide the present case in a way which is consonant with reason and justice, and I therefore hold that the mortgagees, the debenture-holders, have a reasonable time within which to remove these fixtures.

The order was in the following terms:—

Declare that, notwithstanding the determination of the lease, the receiver is entitled within a reasonable time to remove the trade fixtures, and may within such reasonable time sell the same upon the premises comprised in the lease.

Fix six weeks from the time when the applicant decides whether she will appeal or not as a reasonable time for the above purposes.

Subject and without prejudice to his right to remove and sell as aforesaid, the receiver to deliver up possession to the applicant.

The applicant to decide within one week whether she will appeal or not. If she decides not to appeal, the plaintiffs to pay her costs of this application, and add them to their costs of the action.

The plaintiffs' costs to be costs in the action.

The plaintiffs not objecting, liberty for the receiver to apply in the action for the payment of his costs of the application out of the assets.

If the applicant decides to appeal, the case is to be mentioned again.

The applicant did not appeal.

Solicitors: *Wilding Jones; Goldberg, Barrett & Newall; Godden, Son & Holme.*

(1) L. R. 8 Eq. 626.

H. B. H.

SWINFEN EADY J.

1904

March 24.

In re HEATHCOTE. HEATHCOTE *v.* TRENCH.

[1882 H. 2294.]

Accumulations—Payment of Debts—Debts paid out of Capital—Provision for Recoupment—Accumulations Act, 1800 (*Thellusson Act*, 39 & 40 *Geo.* 3, *c.* 98), *s.* 2.

A provision for accumulating income to recoup capital applied in payment of debts is not a provision for payment of debts within s. 2 of the Thellusson Act.

Tewart v. *Lawson*, (1874) L. R. 18 Eq. 490, followed.

SUMMONS in administration action.

By his will dated July 22, 1881, a testator devised his real estate to his trustees upon trust out of the rents and profits to pay certain annuities, including a jointure to his wife and an annuity to his eldest son, and after his death a discretionary allowance not exceeding 1000*l.* a year during the wife's life, or 1500*l.* a year after her death, to the person who, but for the trust for accumulation next mentioned, would be entitled to those rents and profits, and to accumulate the surplus for the discharge of certain specified incumbrances amounting to 116,000*l.* (the trust for accumulation to cease in any case at the expiration of twenty-one years from the death of the survivor of certain persons living at the testator's death, of whom some were still living), and subject thereto to hold the real estate as to one moiety in trust for the testator's wife for life, and as to the other moiety and after her decease as to the entirety in trust for the testator's eldest son for life, with remainders over in strict settlement.

The testator empowered his trustees to sell any portion of his real estate other than the mansion-house, and directed them to invest the proceeds in the purchase of land to be held upon the same trusts, or, if they thought fit, to apply the same in the discharge of incumbrances, but so that if any such moneys should be applied in the discharge of the specified incumbrances payable out of the income accumulation fund

they should be considered a loan from capital to that fund, and should be repaid to capital when and so soon as the income accumulation fund should be sufficient for that purpose.

The testator died on August 17, 1881, and on July 15, 1882, an order for the administration of his real and personal estate was made.

The specified incumbrances were in fact discharged as to 100,000*l.* out of moneys arising from sales under the Settled Land Acts, and as to 16,000*l.* out of moneys arising from sales by the trustees under the powers of the will, but, as during the life of the eldest son the annuities were more than sufficient to exhaust the rents, no accumulation was made.

The testator's wife died on July 17, 1901, and his eldest son on October 29, 1903.

This summons was issued to determine whether the present life tenant was entitled to the whole of the surplus income, or whether any and what part of it ought to be accumulated to recoup capital.

It was admitted that there could be no recoupment in respect of the 100,000*l.* arising from sales under the Settled Land Acts.

Bryan Farrer, for the trustees.

Eve, K.C., and *Archibald Allen*, for the present life tenant. The recoupment clause is not a provision for payment of debts within s. 2 of the Thellusson Act, and, as all the debts are paid and the statutory period of accumulation has expired, there can be no accumulation for the purpose of recoupment: *Tewart* v. *Lawson*. (1)

Hon. E. C. Macnaghten, K.C., and *H. S. Preston*, for the tenant in tail male. There was no recoupment clause in *Tewart* v. *Lawson* (1); so that the observations of Hall V.-C. are only dicta. In the similar case of *Norton* v. *Johnstone* (2), where the estates were sold by the mortgagees, Pearson J. said: "If the testator intended that the rents should be accumulated for the benefit of the remainderman, after the mortgages had been discharged, he has not said so. . . . The

(1) L. R. 18 Eq. 490. (2) (1885) 30 Ch. D. 649, 653.

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mortgage debts have been paid in a way different from that which the testator intended, but he has not provided for that event." The judgment clearly implies that Pearson J. would have given effect to a recoupment clause if there had been one.

Eve, K.C., in reply. In *Norton* v. *Johnstone* (1) the testator had only been dead ten years, and there were accumulations in hand. A recoupment clause might have applied to those accumulations, and possibly to further accumulations for another eleven years. But a recoupment clause cannot be applied after the statutory period has expired.

SWINFEN EADY J. It is quite clear that there can be no recoupment in respect of the 100,000*l.* arising from sales under the Settled Land Acts, and applied in payment of debts. The question of recoupment in respect of this amount has not been argued, and is admittedly unarguable.

The other question is whether there can be an accumulation to recoup the 16,000*l.* arising from sales by the trustees under the powers of the will, and applied in payment of debts.

The testator having now been dead nearly twenty-three years, accumulation is forbidden by s. 1 of the Thellusson Act, unless the matter comes within the excepted cases in s. 2, which provides that "Nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler, or devisor, or other person or persons." In my opinion, where the debts have been paid and satisfied out of capital money, a provision for recouping the estate is not a provision for payment of debts within the meaning of the statute. When, as in this case, the debts have been paid, satisfied, and wholly discharged, s. 2 is no longer applicable, and a provision for accumulating a fund to recoup the estate in respect of money taken out of capital to pay the debts is not within the section. The case is wholly covered by the reasoning of Hall V.-C. in *Tewart* v. *Lawson*. (2) There can therefore be no recoupment.

Solicitors: *Houseman & Co.; Johnsons, Long & Co.*

(1) 30 Ch. D. 649. (2) L. R. 18 Eq. 490.

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KIRKDALE BURIAL BOARD *v.* LIVERPOOL CORPORATION.

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1904

Feb. 24, 25; *March* 26.

[1904 K. 209.]

Local Government—Urban District—County Borough—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 62.

Sect. 62 of the Local Government Act, 1894, which empowers the council of an urban district to transfer to themselves the powers, duties, property, debts, and liabilities of any authority in their district, constituted under any of the adoptive Acts, applies to a county borough.

ACTION.

The plaintiffs were the burial board for the township of Kirkdale, duly constituted under the Burial Acts, 1852 to 1900, and had provided a burial ground under the said Acts, which are adoptive Acts under s. 7 of the Local Government Act, 1894.

The township of Kirkdale was situate within the city of Liverpool, which was made a county borough by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 31. The city of Liverpool included other parishes or townships, some only of which had appointed burial boards and provided burial grounds.

The defendants, who contended that the county borough of Liverpool was an urban district within s. 62 of the Local Government Act, 1894, intended, acting by the city council, to resolve under s. 62 that the powers, duties, property, debts, and liabilities of the plaintiffs, the Kirkdale Burial Board, should be transferred to the city council as from March 25, 1904.

The plaintiffs, who contended that the county borough of Liverpool was not an urban district within s. 62, claimed a declaration that the proposed resolution would be ultra vires and void, and an injunction to restrain the defendants from passing or acting on any such resolution.

Eve, K.C., Danckwerts, K.C., and *R. B. Lawrence,* for the plaintiffs. The question is whether s. 62 of the Local

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Government Act, 1894, applies to a county borough. It provides as follows:—

Sub-s. 1: "Where there is in any urban district, or part of an urban district, any authority constituted under any of the adoptive Acts, the council of that district may resolve that the powers, duties, property, debts, and liabilities of that authority shall be transferred to the council as from the date specified in the resolution, and upon that date the same shall be transferred accordingly, and the authority shall cease to exist, and the council shall be the successors of that authority."

Sub-s. 2: "After the appointed day any of the adoptive Acts shall not be adopted for any part of an urban district without the approval of the council of that district."

The appointed day was November 8, 1894, under s. 84.

Now the county borough of Liverpool is, no doubt, an urban sanitary district, and, therefore, an urban district within the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 5, 6; but it is not an urban district under the Local Government Act, 1894.

There are many indications to that effect. In the first place, the expression "urban district" is defined in Part II., s. 21, which provides:—

Sub-s. 1: "Urban sanitary authorities shall be called urban district councils, and their districts shall be called urban districts; but nothing in this section shall alter the style or title of the corporation or council of a borough:"

Sub-s. 2: "For every rural sanitary district there shall be a rural district council whose district shall be called a rural district:"

Sub-s. 3: "In this and every other Act of Parliament, unless the context otherwise requires, the expression 'district council' shall include the council of every urban district, whether a borough or not, and of every rural district, and the expression 'county district' shall include every urban and rural district whether a borough or not."

But s. 35 provides that, save as specially provided by the Act, Part II., i.e., ss. 20 to 35, shall not apply to a county borough. A county borough is, therefore, expressly excluded from the definition of urban district throughout the Act.

Again, s. 32 provides that certain provisions in Part II. shall apply to a county borough "as if it were an urban district," thereby implying that a county borough is not an urban district.

Again, s. 75, sub-s. 2, defines the meaning of the expression "parochial elector" when used with reference to "a parish in an urban district, or in the county of London or any county borough," clearly implying that a county borough is not an urban district.

The defendants are really a county council under s. 34 of the Local Government Act, 1888, and not a district council at all. If, therefore, they wish to take over the plaintiffs' powers, they must obtain a provisional order from the Local Government Board under s. 10 of that Act, as amended by the Local Government (Transfer of Powers) Act, 1903 (3 Edw. 7, c. 15), the draft order being first submitted to the plaintiffs for their approval. This procedure gives the plaintiffs an opportunity of introducing any necessary modifications in the order, whereas if s. 62 of the Local Government Act, 1894, applies, the plaintiffs have no voice at all in the matter.

Vernon Smith, K.C., *Glen*, K.C., and *John Rutherford*, for the defendants. The definition of "urban district" in s. 21 of the Local Government Act, 1894, applies to the whole Act. It means an urban sanitary district including a county borough. The only effect of s. 35 is to exclude county boroughs from the definition for the purposes of Part II. of the Act.

If the definition is limited to Part II. of the Act, the expression is left undefined for the remainder of the Act, and one is thrown back on s. 75, which provides that, with the exception of the word "parish," expressions used in the Act shall, unless the context otherwise requires, have the same meaning as in the Local Government Act, 1888.

Now the Local Government Act, 1888, does not expressly define "urban district," but s. 100 provides that the expression "district council" and "county district" mean respectively any district council established for purposes of local government under an Act of any future session of Parliament, and the district under the management of such council, and until

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such council is established mean respectively, (*a*) as regards the provisions of this Act relating to highways and main roads, a highway authority and highway area; and (*b*) save as aforesaid, an urban or rural sanitary authority within the meaning of the Public Health Act, 1875, and the district of such authority: and the expression "urban authority" means, until the establishment of district councils as aforesaid, an urban sanitary authority; and after their establishment, the district council of an urban county district.

The expression "urban district" is used in s. 57, sub-s. 1, of the Local Government Act, 1888, which provides that whenever a county council is satisfied that a primâ facie case is made out as respects any county district not a borough for (*c*) the conversion of any such district or part thereof, if it is a rural district, into an urban district, and if it is an urban district, into a rural district, the county council, after certain inquiries and notices, may make an order for the same accordingly.

Having regard to s. 100, the "urban district" referred to can only mean the district of an urban sanitary authority within the meaning of the Public Health Act, 1875, i.e., an urban sanitary district.

The same meaning must, therefore, obtain in the Local Government Act, 1894, and except in Part II. of the Act an urban district includes a county borough.

Again, s. 54, sub-s. 2 (*c*), of the Local Government Act, 1894, provides that where the area of an urban district is extended, by an order of the Local Government Board under s. 54 of the Local Government Act, 1888, which empowers the Local Government Board to alter the boundary of any county or borough or to unite a county borough with a county, certain provisions shall be made.

The expression "urban district" in s. 54 of the Local Government Act, 1894, must, therefore, include the borough or county borough referred to in s. 54 of the Local Government Act, 1888.

Again, s. 53, sub-s. 2, of the Local Government Act, 1894, provides that if the area on the appointed day under any

authority under any of the adoptive Acts will not after that day be comprised within one rural parish, the powers and duties of the authority shall be transferred to the parish councils of the rural parishes wholly or partly comprised in that area, or, if the area is partly comprised in an urban district, to those parish councils and the district council of the urban district, and shall, until other provision is made in pursuance of this Act, be exercised by a joint committee appointed by those councils.

Now s. 1, sub-s. 1, of the Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40), provides that where a joint committee is appointed under s. 53 of the Local Government Act, 1894, for the purposes of the Burial Acts, 1852 to 1885, any expenses incurred in carrying out those purposes shall be defrayed by the councils appointing the committee in such proportion as they may agree upon, or, as in default of agreement, may be determined by the county council, or, "if one of the councils so appointing is the council of a county borough," by the Local Government Board.

It is clear, therefore, that the Legislature considered that the district council of an urban district included the council of a county borough.

It would be very strange if the powers of s. 62, including the power to veto the adoption of adoptive Acts in any part of an urban district, should be conferred on the council of an ordinary urban district, and not on the council of an urban district sufficiently large and important to be made a county borough. In *Ward* v. *Portsmouth Corporation* (1) it was tacitly assumed that the section applied to the county borough of Portsmouth.

Danckwerts, K.C., in reply. The expression "urban district" is defined by the Local Government Act, 1894, ss. 21, 35, as an urban sanitary district, other than a county borough, and the temporary meaning (if any) implied by the Local Government Act, 1888, s. 100, is not applicable.

Cur. adv. vult.

(1) [1898] 2 Ch. 191.

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March 26. SWINFEN EADY J. The question to be determined in this action is whether the area of the county borough of Liverpool is an "urban district" within the meaning of s. 62 of the Local Government Act, 1894. If the answer to this question should be in the affirmative, it is not disputed that the defendants, acting by the city council, are entitled to resolve that the powers, duties, property, debts, and liabilities of the plaintiffs, the burial board for the township of Kirkdale, shall be transferred to the defendants, acting by the city council, as from a date to be specified in the resolution, and that thereby upon the said date the said powers, duties, property, debts, and liabilities will be transferred accordingly, and that the plaintiff burial board will cease to exist, and the defendants will be successors of the plaintiffs.

The definition of "urban district" contained in the Act of 1894 is in s. 21. It is the district of an "urban sanitary authority." The defendants are an urban sanitary authority, and, therefore, if this section were applicable, their district would be an "urban district." But s. 21 is contained in Part II. of the Act, and by s. 35 it is enacted that, save as specially provided by the Act, that part of the Act shall not apply to a county borough.

It is contended that the effect of s. 35 is to exclude a county borough from the definition of "urban district" contained in s. 21, except where specially otherwise provided by some other section of the Act, but I only read s. 35 as meaning that an "urban district" where mentioned in Part II. of the Act does not include a county borough except where expressly so provided. There is no provision that other parts of the Act shall not apply to a county borough, save as specially provided, and s. 21 cannot, in my opinion, be read as if it was a definition of "urban district" excluding county boroughs.

If s. 21 is to be treated as defining "urban district" for all the purposes of the Act, including s. 62, sub-s. 1, then county boroughs are within the definition. If s. 21 is excluded by s. 35 and is not applicable to s. 62, sub-s. 1, in Part IV., then s. 75, sub-s. 1, which provides that expressions used in the Act of 1894 shall, unless the context otherwise requires, have the

same meaning as in the Local Government Act, 1888, meets the case.

The expression "urban district" occurs in s. 57, sub-s. 1 (*c*), of that Act, and, having regard to s. 100—interpretation of "district council" (*b*)—the expression there means the district of an urban sanitary authority within the meaning of the Public Health Act, 1875. By ss. 5 and 6 of that Act, England (except the metropolis) is divided into urban and rural sanitary districts, and urban districts and urban authorities are described, and the county borough of Liverpool is an urban district. Under these circumstances I am of opinion that the county borough of Liverpool is an urban district within the meaning of s. 62, sub-s. 1, of the Local Government Act, 1894.

Moreover, a contrary decision would lead to this result—which would certainly be a curious one—that in every urban district, other than a county borough, the adoptive Acts cannot be adopted for any part of an urban district without the approval of the council of that district, but in county boroughs, which are probably more populous and important, there is nothing to prevent the various portions of the borough, after the appointed day, adopting adoptive Acts, without any consent or approval whatever of the council of the borough.

The expression "urban district" is also used in s. 54 in Part IV. of the Act of 1894, and in my opinion the expression is used there as including a county borough. Thus s. 54, sub-s. 1, provides that where the area of an urban district is extended a certain provision shall be made; and s. 54, sub-s. 2, provides that "The provision aforesaid shall be made (*c*) where the area of an urban district is extended by an order of the Local Government Board under s. 54 . . . . of the Local Government Act, 1888." Now, the Local Government Act, 1888, s. 54, sub-s. 1, provides (inter alia) for the alteration of the boundary of any county borough by the Local Government Board, and, in my opinion, the provision made by s. 54 of the Act of 1894, in the case of an extension or diminution of the area of an urban district, applies where the area of a county borough is altered under s. 54 of the Act of 1888.

The plaintiffs placed considerable reliance on the definition

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of "parochial elector" in s. 75, sub-s. 2, of the Act of 1894. "The expression 'parochial elector,' when used with reference to a parish in an urban district, or in the county of London, or any county borough, means," &c., and it was contended that "urban district" could not include a county borough, as, if it did, it would not have been necessary to add the words "or any county borough"; but the answer to this argument is that in this particular instance the context shews that it was not intended to include a county borough in the expression "urban district."

Again, the Local Government (Joint Committees) Act, 1897, is to be construed as one with the Local Government Act, 1894, and it is clear from s. 1, sub-s. 1 (*a*), of the Act of 1897 that the statute contemplates that one of the councils appointing a joint committee for the purposes of the Burial Acts may be the council of a county borough. But it only has power to do that if it is a district council, and if its district is an "urban district" within the meaning of s. 53 of the Act of 1894. Reading these two statutes together, I am of opinion that the Legislature itself has afforded an exposition of the sense and meaning in which the expression "urban district" is used in the earlier Act: see *Battersby* v. *Kirk* (1); *Morgan* v. *London General Omnibus Co.* (2)

For these reasons I am of opinion that the claim of the plaintiffs fails. The judgment will be as follows: The Court, being of opinion that the area of the county borough of Liverpool is an "urban district" within the meaning of s. 62 of the Local Government Act, 1894, dismiss the action with costs.

Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford, for Cleaver, Holden & Co., Liverpool; Venn & Co., for Edward R. Pickmere, Town Clerk, Liverpool.*

(1) (1836) 2 Bing. N. C. 584, 606.
(2) (1883) 12 Q. B. D. 201, 207; (1884) 13 Q. B. D. 832.

G. R. A.

In re SHILSON, COODE & CO.

[1903 S. 2498.]

SWINFEN EADY J.

1904

March 22, 23, 29.

Solicitor—Costs—Taxation—Collection of Rents—Commission.

In the absence of a special agreement, solicitors cannot charge a lump sum by way of commission for the collection of rents in their bill of costs, as if the work is professional, items must be delivered, and if non-professional, it cannot be charged in the bill.

SUMMONS to review taxation.

The rents of a trust estate having been collected by the trustees' solicitors without any special agreement as to their remuneration, the solicitors in due course delivered their bill of costs to the trustees, charging (inter alia) a commission of 5 per cent. on the total amount of rents collected.

The applicant, a beneficiary, having obtained a third-party order for taxation, the taxing master allowed the commission as a lump sum, holding that details of the work were unnecessary.

The applicant, after disallowance of objections, took out this summons to review.

Eve, K.C., and *Ashworth James*, for the applicant. As there was no agreement under s. 8 of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), the taxing master could not allow a lump sum by way of commission.

If the collection of rents was professional work, an item bill should have been delivered. If non-professional, the charge must be struck out.

The taxing master does not profess to have assessed the cost at a lump sum under Order LXV., r. 27, sub-r. 38a, and in the absence of proper materials he could not have done so: *In re Johnston.* (1)

Vernon Smith, K.C., and *J. G. Wood*, for the solicitors. *In re Johnston* (1) is distinguishable, as in that case the taxing master did not tax the bill at all, but assessed a lump sum in

(1) Ante, p. 132.

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lieu of taxation. In the present case he has taxed the bill, and allowed the item for commission.

In *Attorney-General* v. *Drapers' Co.* (1) a lump sum by way of commission for surveyors' charges was allowed.

[SWINFEN EADY J. Surveyors are in a different position to solicitors.]

There is no reason why solicitors should not be appointed to collect rents at a reasonable commission: *In re Weall.* (2)

[SWINFEN EADY J. In that case the solicitor was acting as an agent. Have solicitors ever been allowed, in the absence of express agreement, to include in their bill a commission for collecting rents as remuneration for professional services? Ought not such a charge to appear in the cash account as money retained?]

There is no authority on the exact point, but as it is a very common practice for solicitors to collect rents on commission, the commission may be considered as sanctioned as a professional payment by the general and established custom and practice of the profession. If so, it ought to be included in the bill: *In re Remnant.* (3) Otherwise it could not be taxed.

Eve, K.C., in reply.

SWINFEN EADY J. The master has proceeded upon the footing that, in the exercise of his discretion and in the absence of any agreement, he is entitled to allow the solicitors a lump sum by way of commission to remunerate them for their trouble in collecting the rents. The applicant seeks to review the taxation, not being satisfied with the taxing master's decision on that point.

In my opinion the solicitors are in a dilemma. If this commission is a charge for professional work done by them as solicitors, they ought to deliver a bill of items in respect of it. In the absence of any agreement with their clients, the master has no discretion to allow a lump sum for work of that character. The reasoning of Farwell J. in *In re Johnston* (4) supports this view. On the other hand, if the work was not

(1) (1869) L. R. 9 Eq. 69.
(2) (1889) 42 Ch. D. 674.
(3) (1849) 11 Beav. 603.
(4) Ante, p. 132.

professional work, the commission ought not to have been included in the bill.

The proper order to make upon this application is to vary the certificate by directing the master to treat the commission as struck out of the bill as an item improperly included. The effect of that will be to leave the matter at large between the parties. The solicitors will still be entitled to their proper remuneration for the work done; they will not be barred in respect of that claim; but, on the other hand, they will not necessarily be entitled to receive this particular sum by way of remuneration. It may be that some application may hereafter be made for them to deliver a bill of items in respect of the work; or it may be that, if the work is treated as non-professional work (that is to say, as non-taxable work, but work for which the solicitors are nevertheless entitled to receive a fair remuneration), the trustees may agree the amount with the solicitors; and if the applicant is dissatisfied with that amount, it may be it will be open to him to impeach the agreement at his own risk; but on the present application the charge must be treated as struck out. This may affect the costs of the taxation under the one-sixth rule. My view is that for the purpose of arriving at that sixth the item is to be treated as struck out of the bill—that is, as if the bill had originally been brought in at a reduced amount—and the one-sixth must be calculated on that footing. The certificate must be varied accordingly.

Solicitors: *Church, Rendell & Co., for Pitts-Tucker & Sons, Barnstaple; Coode, Kingdon & Cotton.*

G. R. A.

END OF VOL. I.

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ACCUMULATIONS — *Payment of Debts — Debts paid out of Capital—Provision for Recoupment—Accumulations Act*, 1800 (*Thellusson Act*, 39 & 40 *Geo.* 3, *c.* 98), *s.* 2.

A provision for accumulating income to recoup capital applied in payment of debts is not a provision for payment of debts within s. 2 of the Thellusson Act.

Tewart v. *Lawson*, (1874) L. R. 18 Eq. 490, followed. *In re* HEATHCOTE. HEATHCOTE *v.* TRENCH - - **Swinfen Eady J. 826**

2. —— *Will—Construction—Remoteness—Accumulations of Income—"Portions"—Gift to Children as a Class—Period of Ascertainment—Accumulations Act*, 1800 (39 & 40 *Geo.* 3, *c.* 98), *s.* 2.

A testator, who died in March, 1888, directed that his trustees should out of the income of his residuary estate set apart a yearly sum of 24*l.*, "while and so long as there shall be a child of my daughter S. A., the wife of H. B., for the time being under the age of twenty-one years, subject as hereinafter mentioned," invest the same and accumulate the income thereof, and should hold the aggregated and accumulated fund in trust for such of the children of his daughter S. as being sons should attain twenty-one, or being daughters should marry, in equal shares, the shares to be vested interests and to be paid and payable in the case of a son at twenty-one, and in the case of a daughter at twenty-one or marriage. Subject as aforesaid, the testator directed the trustees to pay the income of his residuary estate to S. for life, and after her death to her husband H. for life; but he directed that if S. should survive H. the trustees should during the rest of her life pay her the whole income of his residuary estate, and should no longer set apart the annual sums (without prejudice to the sums already set apart and invested and the income thereof).

S. and H. survived the testator and had five children, three of whom were born in the testator's lifetime, and two after his death. The eldest child was born in 1882, and attained twenty-one in 1903, and the youngest was born in 1896, and would not attain twenty-one until 1917:—

Held, (1.) that the period prescribed for aggregation and accumulation (subject to earlier cesser by the death of H. in the lifetime of S., and to later cesser by the birth of other children) was, so long as there was a child of S. under twenty-one, whether it was born before or after its eldest brother or sister attained twenty-one—namely, until 1917.

(2.) Following *Beech* v. *Lord St. Vincent*, (1850) 3 De G. & Sm. 678, that the accumulated fund was a "portion" within the meaning of s. 2 of the Thellusson Act, and the direction to accumulate was valid.

(3.) That the class of children to take was not closed when the eldest child attained twenty-one, but only at the end of the period for accumulation, and that the accumulated fund was not until then divisible.

Watson v. *Young*, (1885) 28 Ch. D. 436, followed.

In re Wenmoth's Estate, (1887) 37 Ch. D. 266, commented on. *In re* STEPHENS. KILBY *v.* BETTS - - - - **Buckley J. 322**

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In the administration of an estate which is insolvent at the date of the judgment, but afterwards realizes enough to pay the principal of all the debts, but not the whole of the interest allowed by the Court, whether on debts which by law carry interest, or on debts which do not, the payment of interest must be governed by the rules of bankruptcy and not those of the Chancery Division.

In re Henley, (1896) 75 L. T. 307, discussed and not followed. *In re* WHITAKER. WHITAKER *v.* PALMER - - - - **Farwell J. 299**

2. —— *Retainer—Personal Representative—Real Representative—Right to retain out of Real Assets—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, *sub-s.* 3.

Part I. of the Land Transfer Act, 1897, which establishes a real representative by vesting the real estate of a deceased person in his personal representative, and provides for the administration of real estate in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents as if it were personal estate, does not confer any new right of retainer or priority in favour of the personal representative as against real assets. *In re* WILLIAMS. HOLDER *v.* WILLIAMS - **Joyce J. 52**

3. —— *Will — "Home Trustees"—"Foreign Trustees"—Foreign Bonds—Foreign Shares transferable Abroad or in London—Locality—English Assets.*

A testator domiciled in England by his will bequeathed all his personal estate in the United Kingdom to certain persons, whom he called his "home trustees," upon certain trusts; and he bequeathed all his personal estate in South Africa to certain other persons, whom he called his "foreign trustees," upon other trusts. At the time of his decease the testator was possessed of the bonds payable to bearer of a waterworks company in South Africa, and of the shares of mining companies in South Africa. The bonds were only payable in South Africa. The mining companies were constituted according to the laws of the Transvaal and Orange Free State, and had their head offices in South Africa, where the register of shareholders was kept and the directors met; but they also had an office in London, where a duplicate register was kept and shares could be transferred. The testator's name was on the London register of the companies, and all his bonds and share certificates were at his bankers' in London:—

Held, that the bonds passed under the bequest to the "foreign trustees," but that the shares passed under the bequest to the "home trustees." *In re* CLARK. MCKECKNIE *v.* CLARK **Farwell J. 294**

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CHARITY—"*Charitable Use*"—*Advowson—Application for Leave to Retain—Charity Commissioners' Consent and Appearance—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17—*Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 5, 6, 8.

A testatrix who died on May 14, 1902, gave an advowson to such uses as her three sisters should within twenty-one years after her death appoint for the purpose of carrying out the express wish of her late husband that the advowson should be made over to and vested in the Church Patronage Trust by all lawful means.

CHARITY—*continued.*

In February, 1903, the advowson was conveyed to the trustees of the trust, and it was thereby agreed that they and the persons deriving title under them should stand possessed of the advowson upon the trusts and subject to the powers comprised in and forming the 9th schedule to a deed of 1871 which governed the trust.

The trust declared by the schedule was to present to the vicarage and parish church from time to time "such fit and pious persons of godly life and conversation, being in holy orders, capable of accepting and holding the same as the trustees for the time being . . . . should determine upon." By the same schedule a trustee was eligible for the appointment, and the trustees were required to be persons "well known or reputed to be of godly life and conversation" professing "themselves members of the Established Church of England and" "known to be zealously attached to the great principles of the Reformed Faith contained in the Liturgy and Articles of the said Established Church."

On May 12, 1903, the trustees issued an originating summons, applying, under s. 8 of the Mortmain and Charitable Uses Act, 1891, for the Court's sanction to the retention by them of the advowson. The Attorney-General was the only defendant to the summons. The summons was not heard until more than a year after the death of the testatrix:—

Held, (1) that the Official Trustee of Charity Lands must be made a party to the proceedings, but that the Charity Commissioners were not necessary or proper parties.

(2) That inasmuch as the trust did not require the trustees to do any more than duty required of any owner of an advowson—namely, to present a fit and proper person in holy orders, capable of accepting and holding the living—the advowson was not assured "to or for the benefit of any charitable use" within the meaning of s. 5 of the Act, and therefore s. 8 had no application to the case.

Semble, (*a*) that, where the trust imposed in respect of an advowson is to present clergymen of a particular type of religious thought in the Church of England there is a charitable trust.

(*b*) That a certificate of the Charity Commissioners under s. 17 of the Charitable Trusts Act, 1853, is not required in the case of an application under s. 8 of the Act of 1891. *In re* CHURCH PATRONAGE TRUST. LAURIE *v.* ATTORNEY-GENERAL - - - - - **Buckley J. 41**

"CHATTEL REAL"—Rent-charge issuing out of leaseholds—Intestacy - - 726
See WILL. 4.

CLASS—Accumulation of income—Remoteness—"Portions"—Gift to children as a class—Period of ascertainment - 322
See ACCUMULATIONS. 2.

CODICIL—Unattested alteration—Confirmation by will - - - - 317
See WILL. 2.

COHABITATION—Presumption from—Marriage—Evidence - - - - 456
See MARRIAGE.

COHABITATION—*continued.*

—— Resumption of cohabitation—Settlement on children of marriage—Separation deed
See SETTLEMENT. 1. 451

—— Trust for wife during cohabitation—Validity—Post-nuptial settlement - 470
See SETTLEMENT. 2.

COMMISSION—Costs—Taxation—Collection of rents - - - - - 837
See SOLICITOR.

COMPANY — *Debenture — Deficient Security — Principal or Interest — Appropriation — Income Tax.*

By a debenture trust deed it was provided that the trustees should appropriate the proceeds of realization of the securities in the first place towards payment of all arrears of interest on the debentures; and, secondly, towards payment of the principal. The company made default; a debenture-holder's action was brought, and the trusts of the deed were ordered to be carried into execution. The securities were gradually realized. Orders were from time to time made under which certain sums were paid on account of interest after deducting income tax, and under other orders payments were made on account generally of what was due for principal and interest. The securities had now all been realized, and the trustees had in their hands a sum of money which they proposed to pay to the debenture-holders. It was admitted that if the whole of the payments were attributed to principal they would be insufficient to discharge the full amount due. The Inland Revenue authorities claimed that all the payments on account generally ought to be attributed to interest in the first place, and that income tax should be deducted from them:—

Held, that the provision in the trust deed for payment of interest in the first place was inserted for the benefit of the debenture-holders, and could be waived by them in the absence of opposition by the debtors; that, as between themselves and the trustees, the debenture-holders must elect whether they would take the money as principal or interest, without prejudice to the question whether in their hands it would afterwards be treated differently; and that income tax would be payable only out of such part of the funds as the debenture-holders elected to take as interest. SMITH *v.* LAW GUARANTEE AND TRUST SOCIETY, LIMITED - - **Byrne J. 500**

2. —— *Debenture — Registration — Power of Company to cancel Unissued Debentures and to issue Fresh Debentures in their place — Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14, *sub-ss.* 1, 6.

A company which has power to exchange and vary its debentures, and has, in pursuance of an agreement to issue debentures as security for a loan, sealed but not issued or registered those debentures, can retain and cancel them and issue other debentures to the lender; and the other debentures, if registered within twenty-one days from the date when they were sealed, will be valid. *In re* N. DEFRIES & CO. BOWEN *v.* N. DEFRIES & CO. - - - **Buckley J. 37**

3. —— *Debenture — Transfer of Debentures — Debenture-holder's Action — Claim by Company*

COMPANY—*continued.*

against Transferor—Registered Holder—Rights against Transferee—Trustee for Creditors.

Debentures in a limited company were assigned by a firm, with other property, to P. as the trustee of a creditors' deed, and P. was registered as the holder of these debentures. The conditions on the debentures provided that the money thereby secured should be paid without regard to any equities between the company and the original or any intermediate holder, and that the registered holder would be regarded as exclusively entitled to the benefit of the debenture, and that the company should not be bound to enter in the register notice of any trust, or to recognise any right in any other person. The firm owed the company 1666*l.*, and the master had certified that the property comprised in the debentures included this debt. On application by the debenture-holders for the distribution of a fund in court in this action in payment of a dividend to the debenture-holders:—

Held, that P. as assignee of the firm was in no better position than his assignors, being simply general assignee in trust for creditors (neither the company nor the debenture-holders having come in under the deed), and he could only be entitled to the debentures subject to the same equities as his assignors were subject to; that the conditions in the debentures did not prevent the company or the debenture-holders from insisting upon their rights against P., just as they could have insisted against his assignors, and that P. must therefore bring into account the 1666*l.* before he could share in the fund now ready for distribution.

In re Goy & Co., [1900] 2 Ch. 149, discussed and distinguished. *In re* BROWN & GREGORY, LIMITED. SHEPHEARD *v.* BROWN & GREGORY, LIMITED. ANDREWS *v.* BROWN & GREGORY, LIMITED - - - - **Byrne J. 627**

4. —— *Director — Contract with Company—Articles of Association—Secret Interest of Director—Vacating Office—Company's Lien on Director's Shares for Repayment of Fees—Money paid under Mistake of Fact—Quantum Meruit.*

Where the articles of a company provide that a director shall vacate his office on the happening of some event or the doing of some act, a director automatically vacates his office on the happening of the event or the act being done; and the board have no power to waive the event, or to condone the offence or the act, which causes the vacation of the office.

The articles of a company provided (art. 21) that the company should have a first and paramount lien upon the shares of any shareholder for any money due from him to the company; (art. 70) that the office of any director should be vacated if he (inter alia) should be concerned in or participate in any contract with the company not disclosed to and authorized by the board; and (art. 75) that the remuneration of the directors should be 1400*l.* a year, to be divided among them in such manner as the majority of them should direct. W. was a director of the company, and on December 24, 1900, he became secretly concerned in a contract with the company, and did not disclose his interest to the

COMPANY—*continued.*

board; the transaction came to an end in June, 1901. At general meetings of the company held on July 8, 1901 and 1902, W. in the usual way retired from office, and was re-elected a director. In February, 1903, the board first discovered W.'s secret interest in the contract of December, 1900. He then ceased to act as a director and sold his shares in the company; but the board refused to register the transfer of the shares, and claimed that the company under art. 21 had a lien on the shares for the repayment by W. of the moneys paid to him (under a resolution of the board) between December, 1900, and February, 1903, as his proportion of the directors' fees under art. 75:—

Held, that under art. 70 W. automatically vacated his office of a director on December 24 1900.

Turnbull v. *West Riding Athletic Club*, (1894) 70 L. T. 92, discussed and distinguished.

But *held*, that W.'s disqualification for office only continued so long as the contract continued, and ceased when the transaction came to an end in June, 1901; consequently his re-elections to office in July, 1901 and 1902, were valid:

Held, also, that W. was not entitled to a quantum meruit for his services as a director rendered to the company between December 24, 1900, and July 8, 1901, but that the company were entitled to recover from him the fees paid him during that period as being moneys paid him under the mistake of fact that he was a director, and that the company had a lien on his shares for those moneys. *In re* THE BODEGA COMPANY, LIMITED - - - - **Farwell J. 276**

5. —— *Directors—Quorum of—Resolution—Interested Director — Validity of Resolution—Articles.*

The articles of a company provided that any director might enter into a contract or be interested in any business with the company; that no director should vote on any matter relating to the contract or business with the company in which he was interested; and that two directors should be a quorum for the transaction of business:—

Held, that a quorum of directors meant a quorum competent to transact and vote on the business before the board; and, therefore, that a resolution passed at a meeting of three directors, two of whom were interested in the subject-matter of the resolution, was invalid. *In re* GREYMOUTH POINT ELIZABETH RAILWAY AND COAL COMPANY. YUILL *v.* GREYMOUTH POINT ELIZABETH RAILWAY AND COAL COMPANY **Farwell J. 32**

6. —— *Directors—Ultra Vires—Dividend out of Capital—Shareholders, Action on behalf of—Ratification—Acquiescence—Retention of Dividend by Plaintiff—Right to maintain Action.*

The accounts of a limited company, at the commencement of their financial year, in 1900, shewed a considerable debit balance on the previous year's trading, but the directors illegally though honestly applied a profit made in the earlier part of 1900 in payment of an interim dividend instead of in reduction of the debit balance, thus, in effect, paying a dividend out of

COMPANY—*continued.*

capital. The balance-sheet for 1900 shewing the debit balance and also the payment of the dividend was submitted to and approved by the shareholders in general meeting. Subsequently, the directors, recognising their mistake, proposed to apply any future profits in wiping out the debit balance, and this was almost entirely accomplished out of profits in 1901 and 1902, as appeared from the balance-sheets for those years submitted to and approved by the shareholders in general meeting.

In 1903 two of the shareholders who had themselves received their portions of the dividend, and concurred in passing the balance-sheets, commenced an action "on behalf of themselves and all other the shareholders of the company" against the company and the directors to compel the directors to repay to the company the amount of the dividend. Afterwards the other shareholders were, at their own request, joined as defendants. All the defendants counter-claimed, in the event of the Court holding that the dividend had been illegally paid, for repayment by the plaintiffs of the portions received by them:—

Held, by Byrne J., that, the payment of the dividend being an act ultra vires, the directors were liable to replace the amount, and judgment was given in the action accordingly, the plaintiffs submitting to judgment against themselves on the counter-claim.

On appeal by the defendants from the judgment in the action:—

Held, that in the circumstances the plaintiffs were not entitled to maintain the action, but that the judgment on the counter-claim must stand.

Per Vaughan Williams and Cozens-Hardy L.JJ.: A shareholder in a limited company who has, with full notice or knowledge of the facts, himself received part of the proceeds of an ultra vires act committed by the directors—such as payment of a dividend out of capital—and who still retains the money, cannot, either individually or as suing on behalf of the general body of shareholders, maintain an action against those directors; nor (per Vaughan Williams L.J.) can he do so even if, after action brought and before trial, he repays the money he has wrongfully received. Whether he can do so if, before action, he repays the money, *quære*. TOWERS *v.* AFRICAN TUG COMPANY - - **C. A. 558**

7. —— *Lease—Tenant's Fixtures—Removal—Determination of Lease by Forfeiture—Mortgage of Lease—Right of Mortgagee.*

A lease to a limited company contained a proviso for the determination of the term in the event of the company going into liquidation. The company having issued debentures which constituted a floating charge on all its property present and future, a receiver was appointed in a debenture-holders' action. The receiver took possession of the leasehold premises and obtained leave from the judge to sell the tenant's fixtures, the lessor being present and not objecting. After the fixtures had been advertised for sale the company went into voluntary liquidation, and the lessor thereupon demanded possession of

COMPANY—*continued.*

the leasehold premises including the fixtures in question:—

Held, that the voluntary act of the company in going into liquidation ought not in the circumstances to prejudice the right of the debenture-holders to remove the tenant's fixtures, and that they were entitled to a reasonable time after the determination of the lease for removal.

Pugh v. *Arton*, (1869) L. R. 8 Eq. 626, commented on. *In re* GLASDIR COPPER WORKS, LIMITED. ENGLISH ELECTRO-METALLURGICAL COMPANY *v.* GLASDIR COPPER WORKS, LIMITED **Joyce J. 819**

8. —— *Limitations, Statute of—Dividends unclaimed—Reduction of Capital by Return of Money to Shareholders—Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

The holder of shares, the certificate of which is under the seal of the company and refers (as is usual) to the memorandum and articles of the company, is not barred by the Statute of Limitations until the expiration of twenty years:—

(*a*) In respect of dividends declared on the shares, from the date of declaration:

(*b*) In respect of capital to be returned on the shares, from the date of notice of the order of the Court confirming the reduction.

In re Drogheda Steam Packet Co., [1903] 1 I. R. 512, followed. *In re* ARTISANS' LAND AND MORTGAGE CORPORATION - - **Byrne J. 796**

9. —— *Memorandum—Alteration—Jurisdiction—Company under Joint Stock Companies Acts*, 1856, 1857 (19 & 20 *Vict. c.* 47; 20 & 21 *Vict. c.* 14)—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 175, 176—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-s.* 1; *s.* 3, *sub-s.* 2.

The Companies (Memorandum of Association) Act, 1890, applies to a company formed and registered under the Joint Stock Companies Acts, 1856, 1857, so that the Court has jurisdiction to confirm an alteration of its memorandum.

In re Nitrophosphate and Odams Chemical Manure Co., Ld., [1893] W. N. 141, *In re Hong Kong and China Gas Co., Ld.*, [1898] W. N. 158, and *In re Copiapo Mining Co.*, [1899] W. N. 25, followed.

In re General Credit Co., [1891] W. N. 153, not followed. *In re* EUPHRATES AND TIGRIS STEAM NAVIGATION COMPANY **Swinfen Eady J. 360**

10. —— *Memorandum of Association—Alteration of Regulations—Life Assurance Company—Mutual Assurance—Policy-holder participating in Profits—Power of Company to alter Rights of Policy-holder—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 50, 209—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1.

The deed of settlement of a life insurance company formed in 1854 provided that the profits should be divided in manner to be directed by a by-law or by-laws made as therein stated, and that any provision of the deed and every by-law might be altered by a by-law or by-laws.

The company had a department called the "Mutual Life Assurance Department," and a by-law made in 1854 provided that the profits of that department, ascertained at a valuation made

triennially, should, after deduction of expenses, be divided among the policy-holders in that department.

In 1862 the company was registered with unlimited liability under s. 209 of the Companies Act, 1862.

In 1886 the plaintiff applied for a policy on his own life in the Mutual Department. He made his application in reliance on the statements contained in a printed prospectus issued and circulated by the company. This document stated (inter alia) that the entire profits in the Mutual Department, after deducting the expenses, "are divided among the policy-holders without any deduction for a reserve fund." A policy for 400*l.* was issued by the company to the plaintiff, by which the company covenanted to pay 400*l.* on his death, "and all such other sums (if any) as the company by their directors may have ordered to be added to such amount by way of bonus or otherwise according to their practice for the time being." The policy was made subject to conditions indorsed on it, and in those conditions there was a reference to the deed of settlement and the by-laws, and also to "the documents addressed to or deposited with the company in relation to the within assurance."

In 1903 it was proposed, under s. 1 of the Companies (Memorandum of Association) Act, 1890, to register the company with limited liability, and to substitute a memorandum of association and articles of association for the deed of settlement. The proposed articles provided that 5 per cent. of the profits of the Mutual Department should be carried to the credit of a reserve fund until that fund should amount to 37,500*l.*:—

Held, that the company must be taken to have contracted with the plaintiff that the whole of the profits of the Mutual Department should be divided among the policy-holders in that department, and that the company could not, either under the by-laws or under s. 50 of the Companies Act, 1862, by an alteration of their regulations affect the right so given to the plaintiff.

Decision of Kekewich J. affirmed.

A company cannot by altering its articles justify a breach of contract.

Allen v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656, distinguished.

Punt v. *Symons & Co.*, [1903] 2 Ch. 506, not followed. BAILY *v.* BRITISH EQUITABLE ASSURANCE COMPANY - - - - **C. A. 374**

11. —— *Memorandum of Association—Conditions—Rights of Shareholders inter se—Power of Alteration—Validity—Reduction of Capital—Special Resolution — Confirmation by Court — Limited Liability—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 12 — *Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

The memorandum of association of a limited company, besides stating the objects of the company and the amount of its capital, stated that the capital was to be divided into specified numbers of preference, ordinary, and deferred shares which were to have specified rights inter se. The memorandum further provided that the rights for the time attached to the several classes of shares respectively might be modified or dealt with in the manner mentioned in the accompanying articles of association:—

Held, that, inasmuch as s. 8 of the Companies Act, 1862, does not require that the rights of the shareholders inter se shall be stated in the memorandum of a limited company, this power of modification of those rights was valid.

Ashbury v. *Watson*, (1885) 30 Ch. D. 376, distinguished.

The company, having passed a special resolution for the reduction of its capital, also resolved in accordance with the provisions of the articles that, after the special resolution had been confirmed by the Court, the rights of the shareholders inter se should be altered in favour of the ordinary shareholders at the expense of the preference shareholders. Some of the preference shareholders opposed the company's petition for the confirmation of the reduction because of this alteration of their rights:—

Held, that the scheme for reduction, including the alteration of the rights of the shareholders, was fair and equitable, and that the reduction ought to be confirmed.

Decision of Buckley J. affirmed. *In re* WELSBACH INCANDESCENT GAS LIGHT COMPANY, LIMITED - - - - - **C. A. 87**

12. —— *Mortgage — Registration — "Charge created by the Company" — Debenture Stock — Covering Deed—Sale of Part of Mortgaged Property—Substitution of other Property—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

Debenture stock issued by a company was secured by a covering deed, executed in 1897, under which the trustees had power, at the request of the company, to sell any part of the mortgaged premises, which included freeholds and leaseholds of the company. The freeholds and leaseholds were described as "the specifically mortgaged premises," and the proceeds of any sale of those premises were to become part of those premises, and were to be applied by the trustees, at the request of the company, in the purchase of (inter alia) any leasehold hereditaments, which were to be assured to the trustees and held by them upon the trusts declared by the covering deed of the specifically mortgaged premises, and were to be deemed to form part of those premises.

Some of the leaseholds comprised in the covering deed having been sold, the trustees, at the request of the company, agreed to apply 2700*l.*, part of the proceeds of sale, in the purchase of a leasehold public-house. By a lease dated March 14, 1902, in consideration of 2700*l.* paid by the company out of their own funds to the lessor, the public-house was demised to them for a term of 1001½ years, at a yearly rental and subject to covenants by the lessees. On August 18, 1902, by a deed which was described as supplemental to the covering deed, the company, in consideration of 2700*l.* paid to them by the trustees, out of moneys held by them under the provisions of the covering deed, sub-demised the public-house to the trustees for the residue of the term

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(except the last day thereof) upon the trusts of the covering deed concerning the specifically mortgaged property and as part of that property, as if the same had been originally comprised in and demised to the trustees by the covering deed:—

Held, that by the sub-demise a charge was created by the company within the meaning of s. 14 of the Companies Act, 1900, and that the sub-demise must be registered under that section.

Decision of Byrne J., [1903] 2 Ch. 527, affirmed.

Per Stirling L.J.: When the leasehold public-house had vested in the company, it became part of their assets over which the trustees of the covering deed had by virtue of that deed a floating, not a specific, charge, and on the execution of the sub-demise and payment of the 2700*l.* by the trustees or the company, the trustees acquired for the first time a specific charge on the public-house, namely, a security of a different kind from that which previously existed. Consequently the sub-demise required registration. CORNBROOK BREWERY COMPANY, LIMITED *v.* LAW DEBENTURE CORPORATION, LIMITED - - **C. A. 103**

13. —— *Sale of Assets—Mortgaged Security—No legal Transfer of Security — Dissolution of Company—Vesting Order—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 143—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 26, *sub-s. ii.* (*c*); *s.* 35, *sub-s.* 1, *cl. ii.* (*c*), *and s.* 36.

When a limited liability company goes into voluntary liquidation for the purpose of carrying out a sale of its property and receives the full purchase consideration, and afterwards becomes automatically dissolved by virtue of s. 143 of the Companies Act, 1862, before the property has been legally conveyed to the purchaser, the Court will in a proper case make an order under the Trustee Act, 1893, vesting the property in the purchaser for all the estate of the company therein at the date of its dissolution. *In re* GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED **Farwell J. 147**

14. —— *Shares, Transfer of—Rectification of Register — Refusal to register — "Usual Common Form"—Address of Transferor—Distinguishing Number of Shares.*

Directors cannot under articles of a company which provide that any member may transfer his shares, "but every transfer must be in writing and in the usual common form," refuse to register a transfer because it omits particulars which would be found in a common form but are in the circumstances immaterial. *In re* LETHEBY & CHRISTOPHER, LIMITED - **Buckley J. 815**

15. —— *Shares, Transfer of—Register of Members—Non-registration—"Default or Unnecessary Delay" in Registration — Accidental Mistake — Reconstruction of Company—Voluntary Liquidation — Unregistered Shareholder — Dissent from Resolutions, Notice of—Rectification of Register—Registration nunc pro tunc, Order for—Retrospective Registration—Rights of Third Parties, Protection of—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 98, 131, 161.

The power given to the Court by s. 35 of the Companies Act, 1862, of rectifying the register of members of a limited company is exercisable in any of the cases therein mentioned, whether a company is in liquidation or not; and, accordingly, in a liquidation the power is not, by s. 98, limited to rectification for the purpose of settling the list of contributories.

In ordering rectification of the register under s. 35, whether the company is in liquidation or not, the Court has power, in a proper case, to fix a particular date at which the registration shall become operative, even to the extent of making it retrospective; but subject, if necessary, to conditions protecting the rights of third persons.

The transferee of shares in a limited company sent in his transfer to the company for registration in the usual course, but by mistake or oversight registration of the transfer was omitted. Subsequently the company passed resolutions for a voluntary winding-up with a view to reconstruction, whereupon the transferee, in the belief that his transfer had been registered, and purporting to act under s. 161 of the Companies Act, 1862, served the liquidator with notice of dissent, which, however, the liquidator disregarded on the ground that the transferee was not a "member" of the company as required by the section. Upon an application by the transferee, under s. 35, for rectification of the register so as to render his notice of dissent effectual:—

Held, by the Court of Appeal (varying an order of Buckley J.), that there had been such "default or unnecessary delay" in registration as entitled the applicant to an order for rectification by entering his name on the register as on a day prior to the passing of the winding-up resolutions:

Held, also, that the order did not invalidate the notices to registered members by which the meetings for a voluntary liquidation had been called, and would not, in the circumstances, work any injustice to other members of the company.

Nation's Case, (1866) L. R. 3 Eq. 77, *Breckenridge's Case*, (1865) 2 H. & M. 642, and *Reese River Silver Mining Co.* v. *Smith*, (1869) L. R. 4 H. L. 64, 80, applied. *In re* SUSSEX BRICK COMPANY - - - - **C. A. 598**

16. —— *Winding-up—Official Receiver—Duty as to giving Information to outside Liquidator—Companies (Winding-up) Rules*, 1903, *rr.* 53, 144.

Information obtained by the official receiver from officers of the company under rule 53 of the Companies (Winding-up) Rules, 1903, is not "property" of the company within rule 144 (1), or "information respecting the estate and affairs of the company . . . . necessary or conducive to the due discharge of the duties of the liquidator" within the meaning of rule 144 (3), which it is the duty of the official receiver to produce to a liquidator superseding him as liquidator.

Quære, whether the Court on sufficient evidence may not direct the official receiver, as its officer, to disclose the information to an outside liquidator. *In re* LAKE GEORGE MINES, LIMITED **Byrne J. 803**

17. —— *Winding-up—Practice—Costs—Taxation — Company — Winding-up Petition — Order dismissing Petition—Costs of Contributories oppos-*

COMPANY—*continued.*

ing — Copies of Evidence filed by Petitioner — Charges of Fraud against Contributories.

The common order dismissing a winding-up petition and giving to contributories opposing one set of costs does not include the usual charges consequent on taking copies of evidence filed by the petitioner and the company, even though serious charges of fraud are made in the petition against the contributories; if these extra costs are to be allowed, sufficient and special grounds must be shewn at the time the petition is dismissed, and a special direction must be given in the order.

Practice as to costs and position of contributories on a winding-up petition discussed. *In re* Ibo Investment Trust, Limited - **Byrne J. 26**

18. —— *Winding-up—Proof—Creditor—Proof of Debt—Amendment—Secured Creditor—Omission to value Security—Vote in respect of whole Debt —"Inadvertence" — Solicitor — Lien on Client's Documents — Waiver — Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *Sched. I., clause* 8.

Solicitors, who had a lien for costs upon title-deeds of a company which were in their possession, proved their debt in the winding-up of the company, stating in the proof that they held no security for the debt, and they voted at a meeting of creditors in respect of the whole debt.

The solicitors afterwards acted for the liquidator in completing the sale of the company's property, and on completion they received the purchase-money and handed over the title-deeds to the purchaser, without any express bargain with the liquidator that their lien should not be prejudiced. They claimed to retain their debt out of the purchase-money, and applied for liberty to amend their proof by stating in it their security and the estimated value of it, or, in the alternative, to withdraw their proof and rely on their security for payment.

One of the solicitors deposed that the form of proof was filled up by a clerk who was ignorant of the existence of the lien, and this was confirmed by the clerk. The solicitor said that when the proof was put before him by the clerk he asked whether it was in order, and, on being assured by the clerk that it was, he swore the proof. It entirely escaped his attention that the proof stated that his firm held no security for the debt. Neither he nor his partner had any intention of surrendering the security, and they were not aware until some months afterwards that the proof made it appear that they did not hold security. The deponent also said that at the commencement of the liquidation a loss to the creditors of the company was not anticipated, for the statement of affairs shewed a surplus after paying the creditors, and the official receiver stated that the assets would be more than sufficient to pay the creditors in full. The assets ultimately proved to be deficient:—

Held, that, under the circumstances, leave ought not to be given to amend or withdraw the proof.

Decision of Buckley J. reversed.

Per Vaughan Williams L.J.: The definition of "inadvertence" given in *Ex parte Clarke*, (1892) 67 L. T. 232, adopted.

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The solicitors had not discharged the onus which lay on them of proving inadvertence on their part. But even if they had discharged that onus, yet they had lost their lien by handing over the deeds to the purchaser without calling the attention of the liquidator to the lien and asking whether he would consent to their retaining the benefit of it.

Stirling L.J. would not say that the omission to value the security did not arise from "inadvertence," though he thought the evidence very unsatisfactory.

But he rested his judgment on this, that the granting of leave to amend or withdraw a proof was not a matter of right, but was subject to the control of the Court, and leave ought not to be granted in a case in which, as here, the position of all parties, and especially that of the liquidator, had been altered since the proof was made. *In re* Safety Explosives, Limited - **C. A. 226**

19. —— *Winding-up — Scheme of Arrangement with Creditors and Contributories—Sanction of Court — Dissent of Class of Contributories having no Interest in Assets — Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 24.

Under s. 2 of the Joint Stock Companies Arrangement Act, 1870, combined with s. 24 of the Companies Act, 1900, the Court has jurisdiction to sanction a scheme of arrangement with the creditors and contributories of a company in liquidation, notwithstanding the dissent of one class of contributories, if the Court is satisfied that having regard to the value of the company's assets that class has no interest in them.

Under such circumstances the scheme must be treated as made between the company and their creditors, and between the company and the other classes of contributories, and a provision made by it for the benefit of the dissentient class must be regarded as in the nature of a gift or concession to them.

Decision of Buckley J. affirmed. *In re* Tea Corporation, Limited. Sorsbie *v.* Same Company - - - - - **C. A. 12**

—— "Securities" —Stocks and shares—Extrinsic evidence, Admissibility of - **176**
See Will. 8.

COMPANY (WINDING-UP) RULES, 1903, rr. 53, 144 - - - - - **803**
See Company. 16.

COMPOUND SETTLEMENT—Sale—Trustees
See Settled Land. 2. **537**

COMPROMISE — Power of executor to compromise claim of co-executor - - **622**
See Executor. 1.

CONDITION — Contract — Validity — Condition attached to goods - - - **354**
See Contract. 3.

—— Name and arms clause—Lawfully assume —Impossible condition—Condition subsequent - - - - **252**
See Will. 10.

"IN CONFIDENCE"—Precatory trust — Absolute gift "in confidence." - 415
See WILL. 12.

CONFLICT OF LAWS — *Domicil—Matrimonial Domicil—English Husband and Scotch Wife—Marriage Contract in Scotch Form—Settlement of Wife's Property — Real Estate in Scotland — Inalienable Life Interest given to Husband—"Alimentary Provision" — Validity of Restriction as against Husband's Mortgagees — Repugnancy — Public Policy.*

The rule that the law of the matrimonial domicil applies to a contract in consideration of marriage will yield to an express stipulation that some other law shall apply, or to other sufficient indications that the parties contracted with reference to some other law.

Scotch "heritable bonds" must be regarded by an English Court as immovable property and therefore governed by Scotch law.

When it is said that a contract, valid by the law of the country in which it is made, cannot be enforced in England because it is contrary to public policy or the policy of English law, it is meant that the contract conflicts with what are deemed in England to be essential public or moral interests—not merely that it would be invalid under English law.

On the marriage in Scotland of a domiciled Englishman with a domiciled Scotswoman the wife's property, which consisted mainly of Scotch heritable bonds, was settled by a marriage contract executed in Scotland in Scotch form. By this contract the trustees, most of whom were domiciled Englishmen, and who were also the trustees of a contemporaneous settlement of the husband's property in English form, were to hold the wife's property upon trust, in case the husband should survive the wife, to pay the income to him during his life, declaring that all payments to him "shall be strictly alimentary, and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors." The husband survived the wife, having mortgaged his life interest under the Scotch contract to mortgagees in England. He had always retained his English domicil.

By the law of Scotland such a restricted life interest, so far as it does not exceed in amount a reasonable provision, is valid as against creditors, other than "alimentary" creditors, and in such a case, if the husband fails to maintain the children of the marriage, they are entitled to attach the alimentary provision made for him.

Upon a summons by the trustees to determine the rights of the mortgagees as against the husband and the only child of the marriage:—

Held (by Vaughan Williams and Cozens-Hardy L.JJ.), that, having regard to all the circumstances and particularly the nature of the limitations in the Scotch contract, it must be taken to have been the intention of the parties that that contract should be governed, not by the law of the English matrimonial domicil, but by Scotch law, and that the "alimentary provision" to the husband, being valid by that law, must be treated as valid by the English Courts, and consequently valid as against the husband's mortgagees, there being nothing in the provision

CONFLICT OF LAWS—*continued.*

contrary to the policy of English law in the proper sense of that term:

Held, by Stirling L.J., that, though the husband and wife had contracted that their rights in her property should be regulated by Scotch law, and it was the duty of the trustees to pay the "alimentary provision" from time to time as it became payable into his hands, regardless of incumbrances created by him, yet an assignment by him of the "alimentary provision" in favour of a domiciled Englishman ought to be held by an English Court to bind funds coming in respect of that provision to the assignor's hands within the jurisdiction of that Court.

Decision of Joyce J., [1903] 1 Ch. 933, reversed. *In re* FITZGERALD. SURMAN *v.* FITZGERALD - - - - C. A. 573

CONSENT — Marriage with — Consent given—Power of retractation - - 120
See WILL. 9.

CONSOLIDATION — Mortgages — Foreclosure—Tacking—Postponement of surety 192
See MORTGAGE. 2.

CONTRACT—*Evidence—Parol Evidence—Statute of Frauds — Specific Performance — Land — Contract—Rescission—Variation.*

Parol evidence is not admissible to prove a subsequent agreement to vary the terms of a contract in writing and by law required to be in writing, although it can be admitted to prove rescission of such a contract. VEZEY *v.* RASHLEIGH - - - - Byrne J. 634

2. —— *Time—"Month"—Lunar Month—Construction of Documents — Commercial Documents —Option to purchase Patent Rights within Six Months—Contract to extend Time implied from Contract — Notice of Exercise of Option sent by Post—Time of Exercise.*

In legal documents the primary meaning of month is lunar month. There is no general exception making it mean calendar month in commercial documents. It can only bear that meaning in cases where, according to the ordinary rules of construction of documents, a secondary meaning can be admitted. The belief or subsequent conduct of the parties cannot affect the construction, but an agreement to extend the time may be inferred from conduct which would make it inequitable to insist on the limit to lunar months. The exercise of an option to purchase patent rights is within the rule laid down in *Henthorn* v. *Fraser*, [1902] 2 Ch. 27; and if the circumstances shew that the parties must have contemplated that the post might be used as a means of communicating on all subjects connected with the contract, the option will be well exercised at the time of posting notice of its exercise. BRUNER *v.* MOORE Farwell J. 305

3. —— *Validity—Sale to Wholesale Trader on Conditions as to Price on Resale — "Wholesale Trader to be deemed Agent of Manufacturer"—Purchase by Retail Trader from Wholesale Trader with Notice—Condition attached to Goods.*

T. & Co., manufacturers of tobacco, sold packet tobaccos subject to printed terms and conditions fixing a minimum price below which they were not to be sold, and containing the following pro-

CONTRACT—*continued.*

viso: "Acceptance of the goods will be deemed a contract between the purchaser and T. & Co. that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of T. & Co." T. & Co. sold to N., who resold for his own profit to S. & Co. S. & Co. had notice of the conditions, but sold to the public at a price below the stipulated minimum:—

Held, that there was no contract between T. & Co. and S. & Co. which T. & Co. could enforce, and that conditions cannot be attached to goods so as to bind all purchasers with notice. TADDY & Co. *v.* STERIOUS & Co.

Swinfen Eady J. 354

—— Vendor's motion to rescind contract—Form of order—Costs - - - 35
See VENDOR AND PURCHASER. 1.

CONTRIBUTORY—Costs of contributories opposing—Copies of evidence filed by petitioner—Charges of fraud against contributories - - - - 26
See COMPANY. 17.

—— Scheme of arrangement—Sanction of Court — Dissent of class of contributories having no interest in assets - 12
See COMPANY. 19.

CONVEYANCING AND LAW OF PROPERTY—Estoppel in pais—Lease by mortgagor—Affirmance by mortgagee - - 774
See ESTOPPEL.

—— Leaseholds—Mortgage—Transfer—"Benefit of said mortgage"—Legal estate
See MORTGAGE. 1. 67

COPIES—Costs—Taxation — Copies of evidence filed by petitioner—Charges of fraud against contributories - - 26
See COMPANY. 17.

CORPORATION—Chairman of justices — Mayor of borough - - - - 718
See JUSTICES.

—— Statutory body—Public duties—Attorney-General, Suing by - - - 76
See LONDON. 1.

COSTS.
See under PRACTICE.

COUNTY—Local government—Urban district—County borough - - - 829
See LOCAL GOVERNMENT.

COVENANT—Further assurance—Legacy duty—Right to indemnity—Reversionary share
See SETTLEMENT. 5. 811

—— Mortgage — Foreclosure — Tacking — Consolidation—Postponement of surety
See MORTGAGE. 2. 192

—— "Not to let" — Breach — Injunction — Damages - - - - 386
See LANDLORD AND TENANT.

—— To settle after-acquired property — Life interest—Annuity - - - 441
See SETTLEMENT. 3.

—— To settle after-acquired property — Scots law—Spes successionis - - 1
See SETTLEMENT. 4.

COVERING DEED—Debenture stock—Mortgage—Registration - - - 103
See COMPANY. 12.

CREDITOR—Scheme of arrangement—Sanction of Court—Dissent of class of contributories having no interest in assets 12
See COMPANY. 19.

CY-PRÈS—*Power—Testamentary Power—Excessive Execution—Cy-près.*

A cy-près estate cannot be implied in lieu of excessive limitations of real estate under a testamentary power, unless it will include all persons intended to take under those limitations, and no others.

Monypenny v. *Dering*, (1852) 2 D. M. & G. 145, and *Hampton* v. *Holman*, (1877) 5 Ch. D. 183, followed. *In re* RISING. RISING *v.* RISING

Swinfen Eady J. 533

2. —— *Will — Cy-près Doctrine — Perpetual Life Estates—Stirpital Distribution—Intestacy.*

A testator, who died before the Wills Act was passed, by his will gave real estate to his children C., G., and M. (without any words of limitation), and declared that they and the survivors of them should stand seised thereof in trust to retain the income thereof for their own benefit in equal shares during their natural lives; but the will contained a proviso that if any of such children should die unmarried, or, being married, without leaving a child, his or her share should accrue to the surviving child or children, equally if more than one, and that the last survivor of the three children should take all the estate devised. The will continued as follows: "But in case such son or daughter so dying shall leave issue at his or her decease . . . . the share of such child so dying to go and be divided equally amongst his or her child or children . . . . for life, share and share alike if more than one, and if but one then the whole share to such only child for life . . . . and so to be continued and distributed in a descending line per stirpes from issue to issue for life so long as any issue shall be living descended from my said children, the children of the parent dying taking parent's share equally between them in all cases of decease." The will contained no gift over in case of default of issue.

G. died in 1856 a bachelor and intestate.

C. died in 1874 leaving one child only, R.

M. died in 1890 without issue, but having devised her real estate to R., who executed a disentailing deed.

It was admitted that only half of the property passed to M. as the survivor of the three children:—

Held, that neither C. nor R. took an estate tail in the other moiety according to the cy-près doctrine, but that on the death of R. there was an intestacy, and that this moiety belonged to the testator's heir.

Mortimer v. *West*, (1828) 2 Sim. 274; 29 R. R. 104, distinguished and commented on. *In re* RICHARDSON. PARRY *v.* HOLMES **Buckley J. 332**

"DAILY" — Gas — Testing — Interpretation of statutes - - - - 76
See LONDON. 1.

DAMAGES—Covenant by landlord "not to let" adjoining premises for a similar business —Breach of covenant - - 386
See LANDLORD AND TENANT.

DEBENTURES — Covering deed — Mortgage — Registration - - - 103
See COMPANY. 12.

—— Deficient security—Principal or interest—Appropriation—Income tax - 500
See COMPANY. 1.

—— Registration—Power of company to cancel unissued debentures and to issue fresh debentures in their place - - 37
See COMPANY. 2.

—— Transfer — Rights against transferee — Trustee for creditors - - 627
See COMPANY. 3.

DEBTS—Payment of—Debts paid out of capital —Provision for recoupment - 826
See ACCUMULATIONS. 1.

DELAY—Shares, Transfer of—Non-registration —"Default or unnecessary delay" 598
See COMPANY. 15.

DEPOSIT—Lands Clauses Acts — Bond—Entry on land before determination of purchase-money - - - 61
See RAILWAY.

DESIGN — *Registration — Infringement — Patent and Registered Design for same Invention—Second Registered Design similar to previous Design—Marking Goods—Knowledge of Seller of infringing Goods—Undertaking to keep an Account—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 51, 52, 58, 59, 60, 61.

The plaintiffs registered a design for improvements in motor cycles at a date between the time when they applied for and the time when they obtained letters patent for a similar invention:—

Held, that a patent and a registered design for the same invention might co-exist; the rights conferred did not clash; and the registration was valid.

The plaintiffs registered a second design, which was very similar to the first, and were said to have subsequently sold machines marked with the second registration number only:—

Held, in the absence of evidence of the truth of this allegation, that the first registration was not forfeited; but *semble*, that it was unnecessary to mark the machines with both numbers.

The defendants at the date when the action was commenced had no knowledge of the registration; but they sold some machines after the writ was issued, and, on an application for an interlocutory injunction, they offered to keep an account:—

Held, that they could not rely on want of knowledge as a reason why an injunction should not be granted, although it protected them from payment of damages for sales effected before writ. WERNER MOTORS, LIMITED *v.* A. W. GAMAGE, LIMITED - - - Byrne J. 264

DEVOLUTION—Freeholds — Mortgagee in possession—Realty or personalty - 518
See MORTGAGE. 3.

DIRECTORS—Quorum of—Interested director—Validity of resolution - - 32
See COMPANY. 5.

—— Ultra vires — Dividend out of capital — Shareholders—Acquiescence - 558
See COMPANY. 6.

—— Vacating office—Company's lien on director's shares for repayment of fees - 276
See COMPANY. 4.

DISCLAIMER—Patent—Revocation — Leave to amend—Conditions—Costs - 239
See PATENT. 1.

DISSOLUTION—Losses and deficiencies of capital —Final settlement of accounts—Distribution of assets - - - 57
See PARTNERSHIP. 1.

—— Receiver and manager—Interference 161
See PARTNERSHIP. 2.

DISTURBANCE — Market rights — Intention — Injunction - - - - 212
See MARKET.

DIVIDENDS—Limitations, Statute of—Dividends unclaimed — Reduction of capital by return of money to shareholders - 796
See COMPANY. 8.

—— Payment of, out of capital—Ultra vires—Shareholders—Acquiescence - 558
See COMPANY. 6.

DOCUMENTS—Construction of—Time—"Month" —Lunar month - - - 305
See CONTRACT. 2.

DOMICIL—"Alimentary provision"—Validity of restriction as against husband's mortgagees - - - - 573
See CONFLICT OF LAWS.

DUTY—Public revenue.
See under REVENUE.

ECCLESIASTICAL LAW—Advowson—Application for leave to retain—Charity Commissioners' consent and appearance 41
See CHARITY.

EDUCATION.
See under SCHOOLS.

ELECTRIC LIGHT—Nuisance—Vibration—Noise —Electric generating station - 707
See NUISANCE. 2.

ENTRY—Lands Clauses Acts—Entry on land before determination of purchase-money —Bond - - - - 61
See RAILWAY.

ESTATE DUTY.
See under REVENUE.

ESTOPPEL—*Estoppel in Pais—Mortgage prior to the Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41)—*Lease by Mortgagor—Affirmance by Mortgagee.*

In 1881, before the coming into operation of the Conveyancing and Law of Property Act, 1881, leasehold premises were mortgaged by way of sub-demise to N. for the residue of a newly created term of sixty years, less the last three days thereof. In 1892 the mortgagor purported to underlet the premises to G. & Co. for twenty-

ESTOPPEL—*continued.*

one years at a rent of 140*l.*, and the deed contained a covenant not to sublet without the consent of the landlord. In 1895 N. foreclosed the mortgagor, but did not get in the last three days of the term, and thenceforward G. & Co. paid the rent to N. until his death in 1899. Subsequently G. & Co. sublet the premises under a licence given by N.'s executors, who therein described themselves as being the reversioners on the underlease of 1892. The plaintiff, who claimed through N.'s executors, brought an action against G. & Co. and their sub-lessee to recover possession of the premises upon the footing that the underlease was not binding upon him:—

Held, that he was estopped as against both defendants from denying that he was the reversioner on the underlease, and that the action failed.

Decision of Joyce J. affirmed.

Per Joyce J.: In the case of a lease by a mortgagor (apart from s. 18 of the Conveyancing and Law of Property Act, 1881), the acceptance of rent by the mortgagee from the lessee, though it converts the lessee into a tenant from year to year of the mortgagee, does not of itself imply that the tenancy is to be upon the terms of the lease so far as applicable to the yearly tenancy. KEITH *v.* R. GANCIA & Co. - - **C. A. 774**

EVIDENCE—Costs — Taxation — Copies of evidence filed by petitioner—Contributories *See* COMPANY. 17. **26**

—— Extrinsic evidence, Admissibility of — "Securities" — Stocks and shares in companies - - - - **176** *See* WILL. 8.

—— Marriage—Presumption from cohabitation *See* MARRIAGE. **456**

—— Parol evidence — Contract — Rescission — Variation—Statute of Frauds - **634** *See* CONTRACT. 1.

—— Smallpox hospital — Admissibility — Quia timet action - - - - **673** *See* NUISANCE. 1.

EXECUTION—Excessive—Testamentary power *See* CY-PRÈS. 1. **533**

EXECUTOR—*Compromise—Power of Executor to compromise Claim of Co-executor—Trustee Act*, 1893 (56 *& 57 Vict. c.* 53), *s.* 21—*Judicial Trustees Act*, 1896 (59 *& 60 Vict. c.* 35), *s.* 3.

It is competent for an executor in a proper case to compromise a claim by his co-executor against the estate.

Where an executor, acting honestly and reasonably, allowed, after inquiry, a claim by the testator's widow, who was co-executrix of the will, to a large sum of money which as she alleged belonged to her, but was represented by securities apparently belonging to the testator:—

Held, that the transaction was valid and binding on residuary legatees. *In re* HOUGHTON. HAWLEY *v.* BLAKE - - **Kekewich J. 622**

2. —— *Indemnity—Privity of Estate — Distribution — Administration — Leaseholds — Contingent Future Liabilities—Retention of Assets.*

On making an order for the distribution of the estate of a testator amongst his residuary

EXECUTOR—*continued.*

legatees the Court will not set aside any part of his assets to indemnify his executors against possible liabilities which may arise in respect of leases formerly held by him, unless there is privity of estate between the executors and the lessors. *In re* NIXON. GRAY *v.* BELL **Byrne J. 638**

EXPULSION—Conduct detrimental to partnership business — Conviction by police magistrate - - - - **486** *See* PARTNERSHIP. 3.

FINANCE ACT.

See under REVENUE.

FIXTURES—Lease — Forfeiture — Tenant's fixtures—Removal — Mortgage of lease—Right of mortgagee - - **819** *See* COMPANY. 7.

FORECLOSURE—Mortgage - - - **192** *See* MORTGAGE. 2.

"FOREIGN TRUSTEES"—"Home trustees"—Locality—English assets - - **294** *See* ADMINISTRATION. 3.

FORFEITURE — Alienation, Forfeiture on — Cancellation of charge before property charged becomes payable - - **157** *See* WILL. 7.

—— Lease — Tenant's fixtures — Mortgage of lease—Right of mortgagee - **819** *See* COMPANY. 7.

—— National school—Trust for endowment — Control of school board - - **270** *See* WILL. 5.

—— Will — Words of futurity — Limitation to events after testator's death - **431** *See* WILL. 6.

FRAUD—Charges of personal fraud—Receiver—Costs of defending action - - **648** *See* RECEIVER.

—— Costs—Taxation—Charge of fraud against contributories - - - **26** *See* COMPANY. 17.

FRAUDS, STATUTE OF—Evidence, Parol—Contract—Rescission—Variation - **634** *See* CONTRACT. 1.

GAS — Testing — "Daily" — Interpretation of statutes - - - - **76** *See* LONDON. 1.

GOODS—Sale of.

See under SALE OF GOODS.

GOODWILL — *Sale of Business — Soliciting old Customers.*

The rule laid down in *Trego* v. *Hunt*, [1896] A. C. 7, that the vendor of the goodwill of a business may not solicit any person, who was a customer of the old business prior to the sale, to continue to deal with the vendor, or not to deal with the purchaser, applies to all such persons, and ought not to be limited so as to exclude persons who before solicitation have of their own accord become customers of the vendor. CURL BROTHERS, LIMITED *v.* WEBSTER **Farwell J. 685**

HIGHWAY—Subsoil of road—Vesting in sanitary authority — Misuse of statutory powers—Injunction - - 759
See LONDON. 2.

HOSPITAL—Smallpox—Quia timet action—Evidence—Admissibility - - 673
See NUISANCE. 1.

HOTCHPOT—Advancement—Appointment 480
See WILL. 1.

HOUSING OF THE WORKING CLASSES — Capital moneys - - - 150
See SETTLED LAND. 1.

HUSBAND AND WIFE—Cohabitation.
See under COHABITATION.

—— Marriage — Evidence — Presumption from cohabitation - - - 456
See MARRIAGE.

—— Married woman mortgagee—Joint account clause — Transfer — Separate acknowledgment - - - - 145
See VENDOR AND PURCHASER. 2.

—— Settlements.
See under SETTLEMENT.

—— Will — Attesting witness — Devise to daughter or her children—Attestation by husband—Intestacy - - 543
See WILL. 3.

"INADVERTENCE"—Solicitor—Lien on client's documents—Waiver - - 226
See COMPANY. 18.

INCOME TAX.
See under REVENUE.

INDEMNITY—Covenant of—Spes successionis—Covenant to settle after-acquired property—Scots law—Jus relictæ - 1
See SETTLEMENT. 4.

—— Leaseholds—Contingent future liabilities—Privity of estate - - - 638
See EXECUTOR. 2.

—— Legacy duty—Reversionary share—Settlement of part—Covenant for further assurance—Right to indemnity - 811
See SETTLEMENT. 5.

—— Receiver — Costs of defending action — Charges of personal fraud - 648
See RECEIVER.

INFRINGEMENT—Design.
See under DESIGN.

—— Patent.
See under PATENT.

INJUNCTION—Corporation—Parties—Attorney-General, Suing by - - - 76
See LONDON. 1.

—— Covenant by landlord "not to let" adjoining premises for a similar business—Overlapping business - - 386
See LANDLORD AND TENANT.

—— Market rights—Disturbance—Intention
See MARKET. 212

—— Partnership—Expulsion - - 486
See PARTNERSHIP. 3.

INJUNCTION—*continued.*

—— Sanitary conveniences, Power to provide—Subsoil of road—Misuse of statutory powers - - - - 759
See LONDON. 2.

—— Smallpox hospital—Quia timet action—Evidence—Admissibility - - 673
See NUISANCE. 1.

—— Vibration — Noise — Electric generating station - - - - 707
See NUISANCE. 2.

INSOLVENCY.
See under BANKRUPTCY.

INSURANCE, LIFE—Policy-holder participating in profits—Power of company to alter rights of policy-holder - - 374
See COMPANY. 10.

INTEREST—Costs paid by unsuccessful party—Repayment on successful appeal—Intermediate interest - - - 704
See PRACTICE. 5.

—— Debenture — Deficient security — Principal or interest — Appropriation — Income tax - - - - - 500
See COMPANY. 1.

—— Estate insolvent at date of judgment afterwards found sufficient to pay principal of debts - - - - 299
See ADMINISTRATION. 1.

INTERFERENCE—Receiver and manager—Dissolution of partnership - - 161
See PARTNERSHIP. 2

INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

INTESTACY — Attesting witness — Devise to daughter or her children—Attestation by husband - - - - 543
See WILL. 3.

—— Charge—Unraised portion — Intestacy of portioner—Owner of land next of kin
See MERGER. 713

—— "Chattel real"—Rent-charge issuing out of leaseholds - - - - 726
See WILL. 4.

—— Cy-près doctrine—Perpetual life estates—Stirpital distribution - - 332
See CY-PRÈS. 2.

INVESTMENT—"Securities"—Context—Stocks and shares in companies—Evidence
See WILL. 8. 176

ISLAND—Presumption that bed of river passes ad medium filum - - - 347
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JOINT STOCK COMPANIES.
See under COMPANY.

JOINT STOCK COMPANIES ACTS — Company under — Memorandum — Alteration — Jurisdiction - - - - 360
See COMPANY. 9.

JUDGMENT—Costs paid by unsuccessful party—Repayment on successful appeal—Intermediate interest - - - 704
See PRACTICE. 5.

JUDGMENT—*continued.*

—— Receiver—Notice to vendor—Rescission of contract on money payment to purchaser *See* VENDOR AND PURCHASER. 5. 658

JUDICATURE ACT—Interest—Estate insolvent at date of judgment afterwards found sufficient to pay principal of debts 299 *See* ADMINISTRATION. 1.

JUDICIAL TRUSTEES — Power of executor to compromise claim of co-executor 622 *See* EXECUTOR. 1.

JURISDICTION — Company under Joint Stock Companies Acts — Memorandum — Alteration - - - - 360 *See* COMPANY. 9.

—— Lunacy — Maintenance — Jurisdiction of Chancery Division - - - 792 *See* LUNACY. 2.

—— Lunatic—Repairs—Charge—Costs 398 *See* LUNACY. 1.

JUS RELICTÆ—Covenant to settle after-acquired property—Spes successionis—Scots law —Covenant of indemnity - - 1 *See* SETTLEMENT. 4.

JUSTICES — *Chairman of Justices — Mayor of Borough—Local Government—Municipal Borough — Borough Justices — County Justices — Petty Sessional Division—Borough without separate Commission of the Peace—"Business of the Borough" —Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 154, 155, 158.

Where a borough has no separate commission of the peace and no Court of quarter sessions, and its charter contains no non-intromittant clause prohibiting the county justices from acting within the borough, the county justices and borough justices have co-ordinate jurisdiction in all matters arising within and relating to the borough.

In such a case, when once a matter has been earmarked as county business or borough business by the issue of a proper summons to appear before the county or the borough tribunal, as the case may be, the county justices or the borough justices, as the case may be, have seisin of it to the exclusion of the other set of justices, although the latter have concurrent jurisdiction and may sit with them to hear the matter.

And in such a case, when once a matter arising within the limits of the borough has been earmarked as county business, the mayor of the borough, though a county justice as well as a borough justice, is not entitled under s. 155 of the Municipal Corporations Act, 1882, to act, virtute officii, as chairman of the county justices.

The principle of *Rex* v. *Sainsbury*, (1791) 4 T. R. 451; 2 R. R. 433, followed. LAWSON *v.* REYNOLDS - - - **Farwell J. 718**

LAND TRANSFER—Retainer—Personal representative—Real representative—Right to retain out of real assets - 52 *See* ADMINISTRATION. 2.

LANDLORD AND TENANT—*Covenant—Letting —Shop—Agreement—Restrictive Covenant—Covenant by Tenant not to carry on other than a specified Business—Covenant by Landlord "not to let" adjoining Premises for a similar Business —Subsequent letting — Overlapping Business — Action against Landlord—Breach of Covenant— Injunction—Damages—Lessor and Lessee.*

T., the landlord of an arcade containing shops, agreed in writing, binding himself and his "assigns," to grant to B., a "fine art dealer," a lease of one of the shops for a term of twenty-one years, determinable on notice at the end of the seventh or fourteenth year; the lease to contain a covenant by the lessee not to carry on upon the premises any other trade or business than such as was therein specified, including that of an "artistic and heraldic stationer"; and also a covenant by the landlord "not to let any other portion of the arcade for the trade or business hereinbefore mentioned to be carried on by the tenant." B. thereupon entered into possession of the shop and carried on his specified trade or business there.

Subsequently T. let a stall forming part of another shop in the arcade to G., a "bookseller and stationer," on a tenancy determinable on three months' notice, and it was agreed that the tenant should not carry on any business other than that of a librarian, newsagent, bookseller, or stationer. G. then proceeded to sell at his stall certain articles commonly included in a business such as that described in his agreement, but which were also included in a business such as that described in B.'s agreement. G. had notice of B.'s agreement.

In an action by B. against T. and G. for an injunction to restrain T. from "letting" and G. from "using" the stall or any other portion of the arcade for any of the purposes of the business described in B.'s agreement:—

Held, (1) that T. had committed a breach of his covenant with B. "not to let" for which he was liable in damages, and that although, in the circumstances, an immediate injunction against T. was not necessary, B. might apply for an injunction in the event of any future breach; but (2) that, as the covenant restrained "letting" only and not "using," B. had no remedy against G. either by injunction or damages.

A restrictive covenant as to the letting or user of property will be construed strictly, and not so as to create a wider obligation than is imported by the actual words: *Kemp* v. *Bird*, (1877) 5 Ch. D. 974. BRIGG *v.* THORNTON - **C. A. 386**

—— Fixtures, Tenant's—Removal—Determination of lease by forfeiture—Mortgage of lease—Right of mortgagee - 819 *See* COMPANY. 7.

—— Mortgagor, Lease by—Affirmance by mortgagee—Estoppel in pais - - 774 *See* ESTOPPEL.

LANDS CLAUSES ACTS—Entry on land before determination of purchase-money—Bond *See* RAILWAY. 61

LEASE.

See under LANDLORD AND TENANT.

LEASEHOLDS — Administration — Contingent future liabilities—Indemnity— Privity of estate - - - - 638 *See* EXECUTOR. 2.

LEASEHOLDS—*continued*

—— Mortgage — Transfer — "Benefit of said mortgage"—Legal estate - - 67
See MORTGAGE. 1.

—— Rent-charge issuing out of—"Chattel real"—Intestacy - - - - 726
See WILL. 4.

LEGACY DUTY.
See under REVENUE.

LETTING—Covenant by landlord "not to let" adjoining premises for a similar business—Overlapping business - 386
See LANDLORD AND TENANT.

LIEN—Company's lien on director's shares for repayment of fees - - - 276
See COMPANY. 4.

—— Liability of next of kin to discharge lien—"Chattel real"—Rent-charge issuing out of leaseholds—Intestacy - 726
See WILL. 4.

—— Solicitor—Lien on client's documents—Waiver—Proof of debt—Amendment—"Inadvertence" - - - 226
See COMPANY. 18.

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIMITATIONS, STATUTES OF—*Principal and Agent—Moneys remitted to Agent for Special Purpose and not accounted for—Express Trust—Action for Account.*

In 1882 the defendant went to the United States as the agent of the plaintiff company to buy timber lands for the company; but finding that the timber lands had been already acquired by third persons, the defendant in 1883 proposed to the company as an investment certain prairie lands of which he had secured the refusal. The company instructed the defendant to buy the lands, and from time to time in 1883 on his request remitted to him moneys for that purpose. The defendant purchased the lands and paid for them out of these moneys, and conveyed the lands to the company. In 1901 the company, having then for the first time discovered that the defendant had charged the company more than he had paid for the lands, brought an action to recover from the defendant the balance of the moneys remitted to him and not accounted for:—

Held, that, the moneys having been remitted by the company to the defendant as their agent for investment in a specified manner, the defendant was an express trustee for the company of those moneys, and that the Statute of Limitation was not a bar to the action.

Burdick v. *Garrick*, (1870) L. R. 5 Ch. 233, and *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, followed.

Watson v. *Woodman*, (1875) L. R. 20 Eq. 721, and *Friend* v. *Young*, [1897] 2 Ch. 421, explained and distinguished. NORTH AMERICAN LAND AND TIMBER COMPANY, LIMITED *v.* WATKINS
Kekewich J. 242

—— Dividends unclaimed—Reduction of capital by return of money to shareholders 796
See COMPANY. 8.

—— Mortgagee in possession—Devolution of mortgaged estate—Realty or personalty
See MORTGAGE. 3. 518

LIQUIDATOR — Official receiver—Duty as to giving information to outside liquidator
See COMPANY. 16. 803

LOCAL GOVERNMENT—*Urban District—County Borough—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 62.

Sect. 62 of the Local Government Act, 1894, which empowers the council of an urban district to transfer to themselves the powers, duties, property, debts, and liabilities of any authority in their district, constituted under any of the adoptive Acts, applies to a county borough. KIRKDALE BURIAL BOARD *v.* LIVERPOOL CORPORATION
Swinfen Eady J. 829

—— Chairman of justices—Borough justices—County justices—Mayor of borough 718
See JUSTICES.

—— School district, Dissolution of—Property of dissolved district - - - 664
See POOR LAW.

LONDON — *Gas — Testing — Interpretation of Statutes—"Daily"—Construing Statute by long prevailing Practice—Sunday Testing—Gaslight and Coke and other Gas Companies Acts Amendment Act*, 1880 (43 & 44 *Vict. c. clxxxi.*), *s.* 7—*Practice — Parties — Injunction — Corporation — Statutory Body—Public Duties—Attorney-General, Suing by.*

By the South Metropolitan Gas Company's special Acts of 1869 and 1876 provision was made for the public testing of the quality of the gas supplied by them to their customers. The mode of testing and the situation and number of the testing places, which were to be provided by the company and to be under the control of the Metropolitan Board of Works (whose powers subsequently became vested in the plaintiffs, the London County Council), were to be prescribed by gas referees appointed by the Board of Trade, and "daily" testings were to be made by gas examiners appointed by the Metropolitan Board.

Similar provisions were contained in the special Acts of the other metropolitan gas companies. By an Act passed in 1880, which was applicable to all the metropolitan gas companies, the provisions as to "daily" testings were substantially re-enacted by a section which provided that a gas examiner should, at each testing place, "make daily" such number of tests as the gas referees should prescribe. Other sections gave the Metropolitan Board, as "the controlling authority," the control and management of the testing places.

There was also a provision in the Act of 1869, which was to be read with the Act of 1880, defining "day" as twenty-four hours, beginning at 9 o'clock in the forenoon of one day and ending at 9 o'clock in the forenoon of the next. The practice under these Acts until 1902 had been to test on week-days only:—

Held (affirming Joyce J., [1903] 2 Ch. 532), that the word "daily" in the Act of 1880 must be construed literally, as including Sundays, and that the previous practice under that and the earlier Acts was not sufficient to justify the Court in departing from that literal construction; and, accordingly, that the gas examiners appointed by the London County Council were

LONDON—*continued.*
entitled to test on Sundays the gas supplied by the company.

Yewens v. *Noakes*, (1880) 50 L. J. (Q.B.) 132, considered.

Held, also, that the London County Council, as the body entrusted by Parliament with the control and management of the testing places provided by the company, were proper plaintiffs in an action for an injunction to restrain the company from preventing the gas examiners from making tests on Sundays; and, therefore, that it was not necessary that the action should be brought by the Attorney-General. LONDON COUNTY COUNCIL *v.* SOUTH METROPOLITAN GAS COMPANY - - - - C. A. 76

2. —— *Sanitary Conveniences, Power to provide—Local Government—Public Health—Sanitary Authority—Subsoil of Road—Vesting in Sanitary Authority—Misuse of Statutory Powers—Injunction—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 44.

By the Public Health (London) Act, 1891, s. 44, sanitary authorities have power to provide public sanitary conveniences in situations where they deem the same to be required, and to defray the expense of providing the same, and of any damage occasioned to any person by the construction thereof. And for the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building, is vested in the sanitary authority.

A sanitary authority constructed in the middle of a street (partly in the subsoil belonging to the plaintiffs as owners of a house at the side of the street) underground conveniences, with underground approaches or subways having an entrance on each side of the street by means of a staircase. The subways could be used for the purpose of passage from one side of the street to the other, and were of greater width than was necessary for the purpose of approaches to the conveniences. The sanitary authority had no statutory power to construct subways:—

Held, on the evidence (differing in this respect from Joyce J.), that the primary object of the sanitary authority in constructing the approaches was that they might be used as a subway for passage from one side of the street to the other, and that consequently they had exceeded their statutory powers and ought to be restrained by injunction.

Decision of Joyce J., [1902] 1 Ch. 269, reversed.

Per Vaughan Williams L.J.: *Semble*, that s. 44 does not vest in the sanitary authority so much of the subsoil as could possibly be used for the purpose mentioned, but that if the sanitary authority do in fact use the subsoil for that purpose the subsoil so used vests in them.

Semble, also, that the sanitary authority have not to pay compensation to the landowner for the subsoil which they use. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* WESTMINSTER CORPORATION - - - - C. A. 759

—— School district, Dissolution of—Property of dissolved district - - - 664
See POOR LAW.

LUNACY—*Administration of Estate—Alteration of Character of Property—Repairs—Permanent Improvements — Payment of Expenses out of Personalty — Charge on Realty — Charge for General Costs in Lunacy—Jurisdiction—Discretion — Benefit of Lunatic — Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 118.

In exercising the power given to the judge by s. 118 of the Lunacy Act, 1890, to charge moneys expended or to be expended under his order for the permanent improvement of the property of a lunatic upon the improved property, the judge may take into consideration, not only the benefit of the lunatic personally, but also what is fair and right as between his real and personal estates.

Regard ought also to be had to the nature and extent of the estate and to the difficulty in drawing a clear line between ordinary repairs and permanent improvements.

A new tenant of a farm, part of a large agricultural estate belonging to a lunatic, agreed to take the farm on condition that an old malthouse should be converted into cottages for labourers. An order was made in the lunacy authorizing the committee to carry out the conversion and to pay the expense of it out of the lunatic's personal estate. The work having been carried out and paid for, the next of kin of the lunatic applied for an order charging the expense upon the real estate in favour of the personal estate:—

Held, that this expense might properly be regarded as incurred in the course of the ordinary management of the real estate, and that it ought not to be charged upon the real estate in favour of the personalty.

Under s. 118 there is jurisdiction to order money already expended under a previous order in permanent improvements to be charged on the improved property, but an application for such a charge should be made promptly.

As a general rule, when an order is made authorizing the expenditure of money in permanent improvements, the order should at the same time direct whether the expenditure is or is not to be charged on the improved property, or, if not, the order should be made expressly without prejudice to the question how as between the real and personal estates the expenditure is ultimately to be borne.

Held, also, that an order made by the master charging part of the general costs in the lunacy upon the lunatic's real estate ought to be discharged. *In re* GIST (A PERSON OF UNSOUND MIND) - - - - - C. A. 398

2. —— *Maintenance, Application of Property for—Jurisdiction of Chancery Division—Person of Unsound Mind not so found—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116.

A lady, who was of unsound mind but not so found by inquisition, had been for some years in an asylum in Germany. Under the will of her father she was absolutely entitled to a trust fund. An originating summons was taken out in her name as plaintiff by a next friend, the trustees being defendants, asking for directions as to the maintenance of the plaintiff out of the income, and as to the application of the residue of the income and of so much (if any) of the capital as

LUNACY—*continued.*
the Court should think fit for the comfort and benefit of the plaintiff. The fund was invested partly in India stock and partly on mortgage.

On the hearing of the summons Joyce J. declined to give any directions as to the maintenance of the plaintiff, being of opinion that, having regard to s. 116 of the Lunacy Act, 1890, that matter would be more properly dealt with in the Lunacy jurisdiction.

Upon the undertaking of the trustees to transfer the stock into court and to deposit in court the mortgage deed and other deeds in their hands relating to the mortgaged property, the Court of Appeal ordered that the interest on the stock and on the mortgage should, during the plaintiff's life or until further order, be paid to the plaintiff's sister (one of the trustees), she undertaking to apply the same for the maintenance, comfort, and benefit of the plaintiff. General liberty to apply was reserved. *In re* CARR'S TRUSTS. CARR *v.* CARR - **C. A. 792**

3. —— *Practice—Vesting Orders—Direction to transfer Stock—Title of Proceedings—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-s.* 1 (*d*); *ss.* 133, 333—*Rules in Lunacy*, 1892, *rr.* 9, 57, 58; *Schedule, Form* 1.

An order in Lunacy directing a transfer of stock under s. 133 of the Lunacy Act, 1890, should be intituled in the matter of the Lunacy Acts, 1890 and 1891, as well as in the matter of the particular lunacy; but this is not to apply to a case under s. 116, sub-s. 1 (*d*) (of a person who through mental infirmity arising from disease or age is incapable of managing his affairs), where the title contains a reference to the statutes "53 Vict. c. 5, and 54 & 55 Vict. c. 65." *In re* PURVIS (A PERSON OF UNSOUND MIND)
Vaughan Williams L.J. 373

LUNACY RULES, 1892, rr. 9, 57, 58; Schedule, Form 1 - - - - **373**
See LUNACY. 3.

MAINTENANCE — Lunacy — Jurisdiction of Chancery Division - - **792**
See LUNACY. 2.

MARKET — *Franchise — Market Rights — Rival Market—Disturbance—Intention—Injunction.*

The plaintiff was the lessee of a market, granted in 1698 by Royal Charter, for weekly sales of horses and cattle, the grant and also the lease including the right to receive the market tolls; and weekly sales were regularly conducted at the market accordingly.

In 1902 the defendant, who was an auctioneer and had been in the habit of holding auction sales of horses and cattle at the weekly market, took a field near the market for the purpose of holding sales there of horses and cattle, and then advertised that an auction sale of Welsh ponies would be held by him there upon a particular market day. On that day, after concluding his usual sale of horses and cattle at the market, he induced several of the persons present to leave the market and accompany him to the sale in his field, and the sale then took place.

In an action brought by the plaintiff against

MARKET—*continued.*
the defendant for an injunction, the defendant disclaimed any intention of setting up a rival market, and excused himself by saying that the market was for various reasons an unsuitable place for the sale of the ponies, which were wild and unbroken:—

Held (reversing the judgment of Kekewich J.), that the defendant's acts constituted such a disturbance of the plaintiff's market and invasion of his market rights as might be restrained by injunction, the question of intention being immaterial.

Goldsmid v. *Great Eastern Ry. Co.*, (1883) 25 Ch. D. 511, and *Mosley* v. *Walker*, (1827) 7 B. & C. 40; 31 R. R. 146, considered. WILCOX *v.* STEEL - - - - **C. A. 212**

MARRIAGE—*Evidence—Presumption from Cohabitation—Husband and Wife.*

An English man and woman travelled to France with the intention of getting married, and there purported to go through a form of marriage; and they had since lived together in England as man and wife for thirty years and had several children. There was some evidence of recognition of the children by the family. It was assumed by the Court that a marriage such as was alleged was impossible according to French law and the habits of law-abiding people in France:—

Held, that this fact was not sufficient to rebut the presumption in favour of marriage arising from the long-continued cohabitation of the parties as man and wife.

The principle of *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, (1881) 6 App. Cas. 364, applied. *In re* SHEPHARD. GEORGE *v.* THYER
Kekewich J. 456

—— Consent, Marriage with—Consent given—Power of retractation - - **120**
See WILL. 9.

—— Forbidden marriages—Forfeiture clause—Words of futurity—Limitation to events after testator's death - - **431**
See WILL. 6.

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MEMORANDUM OF ASSOCIATION—Company.
See under COMPANY.

MERGER—*Charge—Unraised Portion—Intestacy of Portioner—Owner of Land Next of Kin—No Administration—Merger of Beneficial Interest.*

An owner of freehold land who became entitled to an unraised portion charged thereon, as next of kin to an intestate portioner, died without taking out administration to the portioner's estate.

It would have been for the landowner's benefit to merge the charge.

Held, that the landowner's beneficial interest in the charge, subject to the liabilities (if any) of the portioner's estate, had merged in the land.

Lord Compton v. *Oxenden*, (1793) 2 Ves. Jun. 261; 4 Bro. C. C. 397, *Forbes* v. *Moffatt*, (1811)

MERGER—*continued.*
18 Ves. 384, 390; 11 R. R. 222, and *Swabey* v. *Swabey*, (1846, 1848), 15 Sim. 106, 502, followed.
In re Radcliffe, [1892] 1 Ch. 227, distinguished. *In re* FRENCH-BREWSTER'S SETTLEMENTS. WALTERS *v.* FRENCH-BREWSTER
Swinfen Eady J. 713

METROPOLIS.
See under LONDON.

"MONTH"—Time—Lunar month—Construction of documents - - - - 305
See CONTRACT. 2.

MORTGAGE—*Conveyancing — Leaseholds—Mortgage by Sub-demise prior to Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41)—*Statutory Transfer subsequent to Act—Habendum* —"*Benefit of said Mortgage*"—*Legal Estate—Technical Words—Intention—Conveyancing and Law of Property Act*, 1881, *ss.* 27, 63; *Sched. III., Part II., Form* (*A*).

Before the commencement of the Conveyancing and Law of Property Act, 1881, a lessee executed a mortgage of his leaseholds by sub-demise. Subsequently to the commencement of the Act the executors of the mortgagee executed to one of themselves a transfer of the mortgage by supplemental deed in the statutory form (A) in Part II. of Sched. III. to the Act, by which, after reciting the will of the mortgagee, his death, and probate of his will, it purported to "convey and transfer all the benefit of the said mortgage" to the transferee:—

Held, affirming the decision of Kekewich J., that the transfer did not operate, either in terms or by intention, to pass the legal estate in the mortgaged leaseholds. *In re* BEACHEY. HEATON *v.* BEACHEY - - - - C. A. 67

2. —— *Foreclosure—Successive Incumbrances —Real Estate — Tenant for Life of Equity of Redemption—Transfer of First Mortgage to second Mortgagee—Covenant by Tenant for Life for Payment of First Mortgage Debt — Collateral Security—Surety—Principal Debtor—Payment by Surety—Tacking — Consolidation — Postponement of Surety.*

R. was tenant for life of real estate subject to a first mortgage to S. and to a second mortgage (which included additional property) to N., both created by R.'s predecessors in title. Subsequently N. paid off the first mortgage and took a transfer of it, R., the tenant for life, who had been keeping down the interest on both mortgages, joining by covenanting with N. for payment of the first mortgage debt, with a proviso that, as between R., his heirs, &c., estate and effects on the one part, and the first mortgaged premises and the owner or owners for the time being thereof on the other part, the said premises should be the primary fund for payment of the first mortgage debt, and that R.'s covenant should be "only a collateral security" for such payment, but that, notwithstanding, N., his executors, &c., might resort to either means for enforcing payment in preference to such other means.

R. and N. being both dead, a mortgagee's action was brought by N.'s representatives against R.'s representatives, claiming payment of the first mortgage debt pursuant to R.'s covenant, and also the right to tack the second mortgage to the first. The defendants contended that R. had covenanted as a surety, and that, therefore, on payment by them of the first mortgage debt they would be entitled to stand in the place of the plaintiffs, the first mortgagees, and to have an assignment of the securities for that debt. At the trial of the action, which proceeded on the assumption that R. had entered into the covenant as surety and not as principal debtor:—

Held, by Byrne J., though with reluctance, that he was bound by *Farebrother* v. *Wodehouse*, (1856) 23 Beav. 18, and that, therefore, the plaintiffs could, as mortgagees, at the same time enforce payment of the first mortgage debt under R.'s contract of suretyship, and claim the right to tack the second mortgage to the first as against the right of the surety to the transfer of securities; also that the defendants would not, on making such payment, be entitled, under a foreclosure judgment, to a rateable proportion of the securities held by the plaintiffs for both debts.

On appeal—

Held, by Romer and Stirling L.JJ. (Vaughan Williams L.J. dissenting), that upon the construction of the transfer and of R.'s covenant therein, R. was a principal debtor and not a surety, and that consequently, upon the authority of *Duncan, Fox & Co.* v. *North and South Wales Bank*, (1880) 6 App. Cas. 1, 11, and *Newton* v. *Chorlton*, (1853) 10 Hare, 646, neither he nor his representatives could claim the rights of a surety as against either N. or his representatives. The appeal was, therefore, dismissed with costs:

Held, by Vaughan Williams L.J., that, upon the construction of the proviso to the covenant by R. to pay the first mortgage debt, R. was to have the rights of a surety and to be entitled to an assignment of the first mortgage on payment of the principal and interest. NICHOLAS *v.* RIDLEY - - - - - C. A. 192

3. —— *Freeholds—Mortgagee in Possession—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 7—*Devolution of Mortgaged Estate—Realty or Personalty.*

L. was the mortgagee in fee of land of which he took possession in 1861. He remained in possession till his death in 1864. By his will he made his widow executrix and tenant for life, and subject thereto died intestate, leaving I. his heir. The widow and I. were entitled to L.'s personalty.

On L.'s death his widow took possession, which she retained until her death in 1900.

Buckley J. held that although the land descended to I. as heir, he held it as trustee for the widow who was entitled to the mortgage debt as executrix; that I. was not discharged from the trusteeship when the mortgagor was statute-barred; and that the land devolved on the executrix of L. as personalty: *In re Loveridge, Drayton* v. *Loveridge*, [1902] 2 Ch. 859.

I. died in 1880, having been of unsound mind ever since the death of L. He died intestate, and P. was his administrator and A. and X. were his co-heiresses.

Held, by Buckley J., (1) that the mortgagor was statute-barred on January 1, 1879, when s. 7 of the Real Property Limitation Act, 1874, came

MORTGAGE—*continued.*
into force; (2) that the one-half share of the land in which I. was beneficially interested vested in him as realty and descended on his death to his co-heiresses. *In re* LOVERIDGE. PEARCE *v.* MARSH - - - - - **Buckley J. 518**

—— Lease—Tenant's fixtures—Removal—Determination of lease by forfeiture—Mortgage of lease—Right of mortgagee 819
See COMPANY. 7.

—— Lease by mortgagor—Affirmance by mortgagee—Estoppel in pais - - 774
See ESTOPPEL.

—— Married woman mortgagee — Transfer — Joint account clause—Separate acknowledgment - - - - 145
See VENDOR AND PURCHASER. 2.

—— No legal transfer of security—Dissolution of company—Vesting order - 147
See COMPANY. 13.

—— Registration—Debenture stock—Covering deed - - - - - 103
See COMPANY. 12.

MORTMAIN.
See under CHARITY.

MUNICIPAL CORPORATION.
See under CORPORATION.

NAME AND ARMS CLAUSE — "Lawfully assume" — Impossible condition — Condition subsequent - - - 252
See WILL. 10.

NATIONAL DEBT—School district, Dissolution of—Property of dissolved district 664
See POOR LAW.

NEXT OF KIN—Liability of, to discharge vendor's lien for unpaid purchase-money—Intestacy - - - - 726
See WILL. 4.

NOISE — Nuisance—Vibration — Electric generating station - - - 707
See NUISANCE. 2.

NUISANCE — *Smallpox Hospital — Quia Timet Action — Evidence — Admissibility — Injunction refused—Public Health.*
The theory of the aerial convection or dissemination of the disease of smallpox has not received the unequivocal sanction of medical science; and the establishment of a smallpox hospital, properly conducted, is not of itself necessarily such a serious source of danger to persons resident, working, or passing by in its immediate vicinity—say, a radius of 50 feet—as to constitute a public or a private nuisance for which an injunction will lie in a quia timet action.

In such an action evidence is admissible to shew what has occurred in the neighbourhood of other smallpox hospitals carried on under similar conditions, per Cotton L.J. in *Hill* v. *Metropolitan Asylum District*, (1879) 42 L. T. 212; approved on appeal, (1882) 47 L. T. 29, per Lord Selborne, dissentiente Lord O'Hagan. *Sed quære*, whether the admission of such evidence is not wrong in principle as raising a number of side issues on which it is impossible

NUISANCE—*continued.*
for the Court to adjudicate without injury to absent parties. ATTORNEY-GENERAL *v.* NOTTINGHAM CORPORATION - - **Farwell J. 673**

2. —— *Vibration—Noise—Electric Generating Station—Borough Council—Statutory Powers—Provisional Order under Electric Lighting Act—Construction of Works—Temporary Nuisance—Injunction.*
The defendants, a borough council, acting under a provisional order, erected an electric generating station in proximity to houses of which the plaintiffs were lessees and occupiers. The order provided that nothing therein should exonerate the undertakers from an action for nuisance in the event of any being occasioned by them. In an action for an injunction it was admitted that the vibration caused by the defendants' machinery constituted an actionable nuisance unless it was excusable upon the ground of being merely temporary. The defendants alleged that the nuisance could be removed in time by experiment and alteration of the machinery; and contended that until the machinery was perfected the construction of their works was not complete, and the action would not lie against them:—
Held, that the nuisance was not temporary, nor were the defendants to be excused within the principle laid down in *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; and that the defendants were not entitled to carry on their works unless or until they could do so without creating a nuisance. An injunction was granted during the continuance of the plaintiffs' leases.
One of the plaintiffs had granted a sub-lease for the remainder of his term less the last three days thereof:—
Held, that he was entitled to an injunction in respect of injury to his reversion. COLWELL *v.* ST. PANCRAS BOROUGH COUNCIL - **Joyce J. 707**

OFFICIAL RECEIVER.
See under RECEIVER.

ORIGINATING SUMMONS — Administration — Trustee—Neglect to account—Costs
See TRUSTEE. 289

OUTGOINGS—Charge of expenses on frontager's premises—"Completion of works" 493
See VENDOR AND PURCHASER. 3.

PAROL EVIDENCE.
See under EVIDENCE.

PARTIES — Corporation — Statutory body—Injunction—Attorney-General, Suing by
See LONDON. 1. 76

—— Settlement — Trustee — Administration — Representation of trust estate - 260
See PRACTICE. 7.

PARTNERSHIP—*Dissolution—Losses and Deficiencies of Capital—Final Settlement of Accounts—Distribution of Assets—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-s.* 1; *s.* 44.
G., M. & W. went into partnership under a parol agreement that the capital of the business

PARTNERSHIP—*continued.*

should be contributed by them in certain unequal shares, but that profits should be divided equally. Upon a dissolution, after satisfying all liabilities to creditors and the advances of two of the partners, the assets were insufficient to make good the capital. A considerably larger sum was due in respect of capital to G. than to M.:—

Held, that, having regard to s. 44 of the Partnership Act, 1890, the true principle of division of assets was for each partner to be treated as liable to contribute an equal third share of the deficiency, and then to apply the assets in paying to each partner rateably what was due to him in respect of capital. GARNER *v.* MURRAY - - - - **Joyce J. 57**

2. —— *Dissolution—Receiver and Manager—Interference.*

Where a partnership is dissolved by the Court, and a receiver and manager is appointed with a view to the sale of the business as a going concern, any deliberate act, whether by a partner, party to the action, or a stranger, calculated to destroy the value of the business, is an interference with the receiver and manager, and may be restrained as such, even though not otherwise illegal.

E.g., tampering with the employees of the business and inducing them to give notice to leave, and to join a rival business, is an act of interference, although no breach of contract is instigated. DIXON *v.* DIXON

Swinfen Eady J. 161

3. —— *Expulsion Clause — Conduct detrimental to Partnership Business—Breach of Duty as a Partner—Conviction by Police Magistrate—Dishonesty—Interim Injunction.*

Articles of partnership provided that in the event of either of the junior partners being "addicted to scandalous conduct detrimental to the partnership business," or being guilty of "any flagrant breach of the duties of a partner," the senior partner might give the offending partner six days' notice of expulsion from the partnership. One of the junior partners having been convicted by a police magistrate of travelling without a ticket with intent to avoid payment, and fined the full penalty, the senior partner served him with notice of expulsion. On motion by the junior partner for an interim injunction to restrain his expulsion:—

Held, that, as the plaintiff had been convicted of dishonesty, the notice of expulsion was justified, and under the circumstances the Court declined to interfere by interlocutory injunction. CARMICHAEL *v.* EVANS - - **Byrne J. 486**

PATENT — *Disclaimer — Revocation — Leave to amend — Conditions — Infringements prior to Amendment — Discretion — Form of Order — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20—*Costs—Taxed Bill—Successful Appeal from Part of Judgment—Apportionment.*

In a proceeding for revocation of a patent, the Court of Appeal will not review the exercise by a judge of the discretion given to him by s. 19 of the Patents, Designs, and Trade Marks Act, 1883, as to the terms and conditions of an order for revocation, where the judge has

PATENT—*continued.*

exercised his discretion with a full knowledge of all the circumstances of the case.

Appeal from Buckley J. as to form of order for revocation, [1903] 2 Ch. 715, dismissed.

Where the unsuccessful party at the trial of an action has been ordered to pay the costs of the successful party, and those costs have been actually taxed and paid, the Court of Appeal will, upon a successful appeal from part of the judgment, and without remitting the matter to the taxing master, itself examine the taxed bill and fix the proportion to be repaid to the successful appellant. *In re* GEIPEL'S PATENT **C. A. 239**

2. —— *Infringement—Patent for Combination—Sale of Component Part—Intention of Purchaser to infringe—Knowledge of Vendor.*

The sale of a component part of a combination, the subject of a patent, the vendor knowing that the purchaser intends to use the article for the purpose of infringing the patent, is not an infringement by the vendor.

Townsend v. *Haworth*, (1875) 12 Ch. D. 831, n.; 48 L. J. (Ch.) 770, n., followed.

Decision of Swinfen Eady J., [1904] 1 Ch. 164, affirmed. DUNLOP PNEUMATIC TYRE COMPANY *v.* DAVID MOSELEY & SONS, LIMITED **C. A. 612**

3. —— *Pending Action for Infringement — Amendment of Specification without Leave of Court—Subsequent Action on amended Specification—Invalidity of Amendment—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 18, *sub-ss.* 1, 9, 10; *s.* 19—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 5.

Sects. 18 and 19 of the Patents, &c., Act, 1883, which relate to the amendment of a specification, must be read together. Sect. 18 states what an applicant may do before litigation, and s. 19 states what he may do whilst in litigation; and if an applicant, whilst litigation is pending and without leave of the Court under s. 19, amends his specification under s. 18 by leave of the comptroller, the amendment is irregular and void notwithstanding sub-s. 9 of s. 18.

Sub-s. 10 of s. 18 is not limited to litigation pending between the same parties at the time when the application to amend is made, but refers to any action for infringement or petition for revocation pending at that time in relation to the patent. J. B. BROOKS & CO. *v.* LYCETT'S SADDLE AND MOTOR ACCESSORY COMPANY **Farwell J. 512**

—— Registration — Infringement — Patent and registered design for same invention *See* DESIGN. **264**

—— Time — "Month" — Option to purchase patent rights within six months - **305** *See* CONTRACT. 2.

PAYMENT — Debts paid out of capital—Provision for recoupment - - **826** *See* ACCUMULATIONS. 1.

POLICY—Life insurance. *See* under INSURANCE, LIFE.

POOR LAW — *School District — Incorporated Board of Management—Dissolution of School District—Property of Dissolved District—Powers of*

POOR LAW—*continued.*

last acting Managers—Transfer of Consols—Vesting Order—Poor Law Amendment Act, 1844 (7 & 8 *Vict. c.* 101), *ss.* 42, 43, 45—*Metropolitan Poor Amendment Act*, 1869 (32 & 33 *Vict. c.* 63), *s.* 1—*Dissolved Boards of Management and Guardians Act*, 1870 (33 & 34 *Vict. c.* 2), *ss.* 1, 12—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *s.* 22—*Local Government Board—Validity of Order—Form of Order.*

A school district formed under s. 40 of the Poor Law Amendment Act, 1844, and the board of management for that district formed under s. 42 of that Act, are distinct and separate entities, the latter being by s. 45 of the same Act constituted a corporation to hold the property of the district; and when the district is dissolved by virtue of an order of the Local Government Board made under s. 1 of the Metropolitan Poor Amendment Act, 1869, the corporation created by s. 45 of the Act of 1844 remains in existence.

In such a case the property of the district does not automatically vest in the last acting managers of the corporation by virtue of the words "shall be transferred to and vested in" in s. 12 of the Dissolved Boards, &c., Act, 1870, but must be transferred to them or to other parties, as the case may be, by a proper document, and the last acting managers or the survivors of them, as the last acting corporators, can for that purpose affix the seal of the corporation to the document.

Quære, whether the Local Government Board, when they have issued an order under s. 1 of the Act of 1869 dissolving and fixing a date for the dissolution of a school district have power from time to time by subsequent orders to postpone the date of dissolution.

Quære also, whether, when an order is issued under s. 1 of the Act of 1869 dissolving a school district, the Local Government Board ought not, "prior to" issuing such order, make an order under the section for the sale of the property of the managers of the district and the application of the proceeds.

Semble, when the Local Government Board make an order under s. 1 of the Dissolved Boards, &c., Act, 1870, extending the period for which the last acting managers of a dissolved district are to continue in office, the order should follow the words of the section, and should state the "special purpose" for which the last acting managers are to continue to act. MORTON *v.* BANK OF ENGLAND - - **Farwell J. 664**

"PORTIONS"—Accumulation of income—Remoteness—Gift to children as a class—Period of ascertainment - - **322**
See ACCUMULATIONS. 2.

POST-NUPTIAL SETTLEMENT.
See under SETTLEMENT.

POWER OF APPOINTMENT—Cy-près—Testamentary power—Excessive execution
See CY-PRÈS. 1. **533**

POWERS—Whether personal or annexed to the office—Power given to "my said trustees" - - - - **139**
See WILL. 11.

PRACTICE—*Costs—Administration—Order to pay Costs out of Fund in Court—Insufficient Fund—Priority of Administrator's Costs.*

An order on the further consideration of an administration action that the costs of all parties are to be paid out of a fund in court does not amount to a direction that they are to be paid equally. If the fund turns out insufficient to pay all the costs, the costs of administrators must be paid in priority to those of other parties.

Gaunt v. *Taylor*, (1843) 2 Hare, 413; 62 R. R. 164, followed.

Swale v. *Milner*, (1834) 6 Sim. 572, not followed. *In re* GRIFFITH. JONES *v.* OWEN **Farwell J. 807**

2. —— *Costs—Assessment of Lump Sum in lieu of Taxation—No Objections carried in—Summons to review—Duty of Taxing Officer—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 27, *sub-rr.* 38*a*, 39–41.

The discretion given to taxing officers by sub-rule 38a of rule 27 of Order LXV., to assess a lump sum for costs in lieu of taxation, is a very delicate one, to be exercised judicially and only when special circumstances justify that course, and then only on evidence. And if a taxing officer proceeds under the sub-rule, it is his duty to state in his certificate that he has assessed under the sub-rule, and to give his reasons for doing so.

A taxing officer stated in his certificate that he had taxed a bill of costs at a certain figure, but he had in fact proceeded under the sub-rule and had assessed a lump sum for costs in lieu of taxation. On summons to review without carrying in objections:—

Held, that the taxing officer had proceeded on a wrong principle, and that the bill of costs must go back for taxation. *In re* JOHNSTON. MILLS *v.* JOHNSTON - - - **Farwell J. 132**

3. —— *Costs before Action—Threat of Proceedings—Preparation for Defence before Issue of Writ—Taxation—Rules of the Supreme Court*, 1883, *Order* LXV., *r.* 27, *sub-r.* 29.

Defendant, being threatened with an action for being party or privy to a fraud disclosed in a previous action to which he was not a party, obtained a transcript of the speeches, evidence, and judgment therein before the issue of the writ in the present action, with a view to defending the same. The present action was subsequently dismissed for want of prosecution:—

Held, that the defendant was entitled under Order LXV., r. 27, sub-r. 29, to the costs of only so much of the transcript of the evidence and judgment as related to the issue in the present action. BRIGHT'S TRUSTEE *v.* SELLAR **Swinfen Eady J. 369**

4. —— *Costs—Inspection of Property, the Subject of Action—No Order—Taxing Master's Discretion—Taxation—Rules of the Supreme Court*, 1883, *Order* L., *r.* 3.

The costs of an inspection of property being the subject of an action will not be disallowed merely because the inspection has been arranged between the solicitors of the parties, without an order for it having been obtained under Order L., r. 3. ASHWORTH *v.* ENGLISH CARD CLOTHING COMPANY (No. 1) - **Joyce J. 702**

PRACTICE—*continued.*

5. —— *Costs—Interest—Costs paid by unsuccessful Party—Repayment on Successful Appeal—Intermediate Interest—Satisfaction of Judgment Debt—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 17.

A plaintiff whose action was dismissed with costs paid the defendants' costs with interest to date. The Court of Appeal having reversed the decision of the Court of first instance, the defendants repaid the sum they had received with interest to date. Upon further appeal the House of Lords restored the original order, whereupon the plaintiff repaid to the defendants the sum he had received from them, but without any further interest:—

Held, that the defendants were entitled to interest on that sum from the time when they had paid it to the plaintiff down to the time of repayment to themselves. ASHWORTH *v.* ENGLISH CARD CLOTHING COMPANY (No. 2) **Joyce J. 704**

6. —— *Costs—Refresher Fees—Discretion of Taxing Master—Party and Party Costs—Taxation—Rules of the Supreme Court, Order* XLV., *r.* 8; *r.* 27, *sub-rr.* 29, 48.

Under rule 10 of January, 1902, of Order LXV. (which is the new sub-rule 29 of rule 27 of the same order) the discretion of the taxing master to allow refresher fees is no longer limited, in taxations as between party and party, to the maximum fees prescribed by Order LXV., r. 27, sub-r. 48; and he may allow such fees as shall appear to him to be necessary or proper for the attainment of justice or for defending the rights of any party. CAVENDISH *v.* STRUTT **Buckley J. 524**

7. —— *Parties — Settlement — Trustee — Administration—Representation of Trust Estate.*

An action for breach of trust was brought by a beneficiary under a settlement against, as sole defendants, the executors of one of the two trustees, but not the surviving trustee, of the settlement. The surviving trustee was also dead, and no new trustees of the settlement had been appointed, although the person in whom the power to appoint was vested was prepared to exercise it:—

Held, that the representatives of the surviving trustee must be added as defendants, or that new trustees of the settlement must be appointed and added as defendants. *In re* JORDAN. HAYWARD *v.* HAMILTON - - **Byrne J. 260**

—— Appeal — Taxed bill — Successful appeal from part of judgment—Apportionment *See* PATENT. 1. **239**

—— Costs—Collection of rents—Commission—Taxation - - - - **837** *See* SOLICITOR.

—— Costs—Copies of evidence filed by petitioner—Charges of fraud against contributories—Taxation - - - - **26** *See* COMPANY. 17.

—— Costs—Lunatic—Administration of estate—Repairs—Charge for general costs in lunacy - - - - **398** *See* LUNACY. 1.

PRACTICE—*continued.*

—— Costs—Receiver — Indemnity—Charges of personal fraud — Costs of defending action - - - - **648** *See* RECEIVER.

—— Costs—Trustee—Neglect to account—Costs of taking and vouching account - **289** *See* TRUSTEE.

—— Costs—Vendor's motion to rescind contract—Form of order - - - **35** *See* VENDOR AND PURCHASER. 1.

—— Lunacy — Vesting orders — Direction to transfer stock—Title of proceedings **373** *See* LUNACY. 3.

—— Originating summons—Costs of taking and vouching account—Trustee—Neglect to account - - - - **289** *See* TRUSTEE. 12.

—— Parties — Corporation — Injunction — Attorney-General, Suing by - - **76** *See* LONDON. 1.

PRECATORY TRUST—Absolute gift "in confidence" - - - - **415** *See* WILL.

—— "I desire"—Construction of will - **549** *See* WILL. 13.

PRESUMPTION — Marriage — Evidence — Presumption from cohabitation - **456** *See* MARRIAGE.

—— Riparian proprietor—Presumption that bed of river passes ad medium filum—Island in middle of river - - - **347** *See* RIVER.

—— Trade-mark — Registration — Presumption arising from long user - - **736** *See* TRADE-MARK. 2.

PRINCIPAL AND AGENT — Express trust — Moneys remitted to agent for special purpose and not accounted for - **242** *See* LIMITATION, STATUTES OF.

PRINCIPAL AND SURETY—Mortgage—Foreclosure — Tacking — Consolidation — Postponement of surety - - **192** *See* MORTGAGE. 2.

PRIORITY—Costs — Insufficient fund—Priority of administrator's costs - - **807** *See* PRACTICE. 1.

PRIVATE INTERNATIONAL LAW. *See* under CONFLICT OF LAWS.

PRIVITY OF ESTATE—Administration—Leaseholds — Contingent future liabilities—Indemnity - - - - **638** *See* EXECUTOR. 2.

PUBLIC HEALTH—Nuisance. *See* under NUISANCE.

—— Outgoings—Charge of expenses on frontager's premises—"Completion of works" *See* VENDOR AND PURCHASER. 3. **493**

PUBLIC HEALTH (LONDON)—Sanitary conveniences, Power to provide—Subsoil of road - - - - - **759** *See* LONDON. 2.

PUBLIC POLICY—Domicil—"Alimentary provision" — Validity of restriction as against husband's mortgagees - 573
See CONFLICT OF LAWS.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUANTUM MERUIT—Director—Vacating office—Company's lien on director's shares for repayment of fees - - 276
See COMPANY. 4.

QUIA TIMET ACTION — Smallpox hospital — Evidence—Admissibility - 673
See NUISANCE. 1.

QUORUM—Directors—Resolution, Validity of—Interested director - - - 32
See COMPANY. 5.

RAILWAY—*Entry on Land before Determination of Purchase-money—Deposit of Estimated Value—Bond—Payment out of Deposit to Company—Evidence—Delivery up of Bond—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 85, 86, 87, 124.

When under s. 85 of the Lands Clauses Consolidation Act, 1845, a railway company have entered into possession of land which they are authorized to take, giving a bond to the person who claims to be entitled to the land and depositing money in court as provided by that section, the company, having satisfied the conditions of the bond and shewing that it has been delivered up to them, are entitled, upon a petition by themselves and the obligee of the bond, to have the money deposited repaid to them, without proving that the purchase-money of the land has been paid to the persons really entitled to it.

The rights of any person, other than the obligee of the bond, having an interest in the land are protected by s. 124 of the Lands Clauses Consolidation Act.

Decision of Kekewich J. reversed. *Ex parte* MIDLAND RAILWAY COMPANY - - C. A. 61

REAL ESTATE—Mortgages.
See under MORTGAGE.

REAL ESTATE CHARGES—"Chattel real"—Rent-charge issuing out of leaseholds—Intestacy - - - - 726
See WILL. 4.

REAL PROPERTY LIMITATION—Mortgagee in possession — Devolution of mortgaged estate—Realty or personalty - 518
See MORTGAGE. 3.

RECEIVER—*Costs—Indemnity—Charges of Personal Fraud—Costs of Defending Action—Benefit of Trust Estate.*

Though a receiver while acting in the discharge of his duty is entitled to be indemnified against all loss, including the costs of actions brought against him as receiver, still the guiding principle laid down by *Walters* v. *Woodbridge*, (1878) 7 Ch. D. 504, is that the defence to the action was for the benefit of the trust estate.

Where an action had been brought against a receiver and administrator pendente lite charging him with personal fraud and misconduct while acting as administrator and receiver, but otherwise having no relation to the estate except so far that the acts complained of were acts done by him while acting as an officer of the Court:—

Held, that the receiver was not entitled to be indemnified against the costs incurred in successfully defending this action.

Courand v. *Hanmer*, (1846) 9 Beav. 3, and *Bristowe* v. *Needham*, (1847) 2 Ph. 190, distinguished. *In re* DUNN. BRINKLOW *v.* SINGLETON Byrne J. 648

RECEIVER—*continued.*

—— Interference—Dissolution of partnership
See PARTNERSHIP. 2. 161

—— Notice to vendor—Rescission of contract on money payment to purchaser—Secured creditor - - - - 658
See VENDOR AND PURCHASER. 5.

—— Official—Duty as to giving information to outside liquidator - - - 803
See COMPANY. 16.

RECTIFICATION—Shares, Transfer of—Rectification of register—Refusal to register—"Usual common form" - - 815
See COMPANY. 14.

—— Trade-mark — Registration — Presumption arising from long user - - 736
See TRADE-MARK. 2.

REDUCTION OF CAPITAL—By return of money to shareholders—Limitations, Statute of—Dividends unclaimed - - 796
See COMPANY. 8.

—— Special resolution—Confirmation by Court
See COMPANY. 11. 87

REFRESHER FEES—Taxation—Party and party costs—Discretion of taxing master 524
See PRACTICE. 6.

REGISTER—Refusal to—Transfer of shares—"Usual common form" — Address of transferor - - - - 815
See COMPANY. 14.

REGISTRATION—Debenture - - 37
See COMPANY. 2.

—— Mortgage — Debenture stock — Covering deed - - - - - 103
See COMPANY. 12.

—— Patent and registered design for same invention - - - - 264
See DESIGN.

—— Shares, Transfer of — Non-registration — "Default or unnecessary delay" - 593
See COMPANY. 15.

—— Trade-mark.
See under TRADE-MARK.

—— Trade-mark—Motion to rectify—Presumption arising from long user - 736
See TRADE-MARK. 2.

REMOTENESS — Accumulation of income — "Portions"—Period of ascertainment
See ACCUMULATIONS. 2. 322

RENT-CHARGE — Issuing out of leaseholds—"Chattel real"—Intestacy - 726
See WILL. 4.

RENTS—Costs—Taxation—Collection of rents—Commission - - - - 837
See SOLICITOR.

—— Vendor in possession and receiving rents after date for completion—Arrears of rent previously due - - 464
See VENDOR AND PURCHASER. 4.

REPAIRS—Lunatic—Administration of estate—Charge—Costs - - - 398
See LUNACY. 1.

RESCISSION—Contract—Variation—Parol evidence—Statute of Frauds - 634
See CONTRACT. 1.

—— Contract on money payment to purchaser—Receiver—Secured creditor - 658
See VENDOR AND PURCHASER. 5.

—— Vendor's motion to rescind contract—Form of order—Costs - - - 35
See VENDOR AND PURCHASER. 1.

RESOLUTION—Validity of—Quorum of directors—Interested director - - 32
See COMPANY. 5.

RESTRICTIVE COVENANT.
See under COVENANT.

RETAINER—Land Transfer Act—Right to retain out of real assets - - - 52
See ADMINISTRATION. 2.

RETRACTATION—Power of—Marriage with consent—Consent given - - 120
See WILL. 9.

REVENUE—Income tax—Debenture—Deficient security—Principal or interest—Appropriation - - - - 500
See COMPANY. 1.

—— Legacy duty—Indemnity, Right to—Reversionary share—Settlement of part—Covenant for further assurance - 811
See SETTLEMENT. 5.

—— Settlement estate duty—Testamentary expenses—Direction to pay - - 363
See WILL. 14.

REVERSION—Legacy duty—Right to indemnity—Reversionary share—Settlement of part—Covenant for further assurance
See SETTLEMENT. 5. 811

REVOCATION—Patent—Leave to amend—Conditions - - - - 239
See PATENT. 1.

RIVER—*Riparian Proprietor—Statutory vesting of Lands abutting on River—Presumption that the Bed of the River passes ad medium filum—Island in Middle of River—Extent of Presumption.*

By a private Act of Parliament passed to settle certain disputes between the lord of a manor and the commoners certain common lands abutting on a river were vested in a body of conservators incorporated by the Act. Such lands were defined in a schedule to the Act and by reference to a map, but these were not so expressed or drawn as to include any part of the bed of the river. The conservators by virtue of the presumption applicable to a grant of land abutting on a river claimed to be entitled to the adjoining moiety of the bed of the river including the moiety of an island in the middle of the river,

RIVER—*continued.*

and they brought an action against another riparian proprietor in respect of an alleged trespass by the removal of gravel from this half of the bed of the river. This island was of ancient origin. The spot from which the gravel was dug was partly opposite to the island, and nearer to the island than to the plaintiff's bank:—

Held, that, assuming that the presumption applied the medium filum aquæ ought to be drawn, not through the island, but through the stream between the island and the plaintiff's lands, and that the action failed.

Semble, the plaintiffs were entitled under the Act to half the bed of the stream between their lands and the island. GREAT TORRINGTON COMMONS CONSERVATORS *v.* MOORE STEVENS
Joyce J. 347

ROAD.
See under HIGHWAY.

RULES OF SUPREME COURT:—Order L., r. 3—*Interlocutory Orders as to Injunctions, &c.* - - - - - 702
See PRACTICE. 4.

—— Order LV., rr. 62, 63—*Chambers in the Chancery Division* - - - 299
See ADMINISTRATION. 1.

—— Order LXV., r. 8; r. 27, sub-rr. 29, 48—*Costs* - - - - - 524
See PRACTICE. 6.

—— —— r. 27, sub-r. 29 - - - 369
See PRACTICE. 3.

—— —— —— sub-r. 38*a*, 39–41 - - 132
See PRACTICE. 2.

SALE—Patent for combination—Infringement—Sale of component part - - 612
See PATENT. 2.

—— Settled land—Resettlement—Sale by original life tenant—Compound settlement—Trustees - - - 537
See SETTLED LAND. 2.

—— Tenant for life—Best price—Undervalue—Purchaser—"Dealing in good faith"
See SETTLED LAND. 3. 689

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

SALE OF GOODS—Contract—Validity—Condition attached to goods - - 354
See CONTRACT. 3.

—— Patent and registered design for same invention—Infringement - - 264
See DESIGN.

SANCTION OF COURT—Scheme of arrangement—Dissent of class of contributories having no interest in assets - 12
See COMPANY. 19.

SANITARY CONVENIENCES—Power to provide—Subsoil of road—Misuse of statutory powers—Injunction - - 759
See LONDON. 2.

SCHEME OF ARRANGEMENT—Sanction of Court—Dissent of class of contributories having no interest in assets - 12
See COMPANY. 19.

SCHOOLS—Dissolution of school district—Property of dissolved district - - 664
See POOR LAW.

—— Will—Forfeiture—National school—Trust for endowment—Control of school board
See WILL. 5. 270

SCOTTISH LAW — "Alimentary provision" — Validity of restriction as against husband's mortgagees - - - 573
See CONFLICT OF LAWS.

—— Covenant to settle after-acquired property—Spes successionis - - - 1
See SETTLEMENT. 4.

SECURED CREDITOR—Proof of debt—Amendment — "Inadvertence" — Solicitor — Lien on client's documents—Waiver
See COMPANY. 18. 226

"SECURITIES" — Stocks and shares in companies — Extrinsic evidence, Admissibility of - - - - 176
See WILL. 8.

SETTLED LAND—*Capital Money—Additions and Alterations with a view to letting—House in Occupation of Tenant—"Reconstruction, Enlargement, or Improvement"—"Dwellings available for Working Classes"—Settled Land Acts*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25, *sub-ss. x., xx.*; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s. ii.—Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *s.* 74, *sub-s.* 1 (*b*).

Where trustees have approved a scheme of improvements before they have capital moneys in hand available for carrying it out, subject to the opinion of the Court being obtained on the legal question whether the proposed improvements are within the Act, the Court will decide the legal question though it would not make a prospective order approving the scheme.

Where a tenant, in occupation of a house, has given notice to quit unless certain additions are made, and it would be difficult or impossible to relet the house without making the additions, they may be paid for out of capital as necessary or proper to enable the house to be let within s. 13, sub-s. ii., of the Settled Land Act, 1890.

The proviso in s. 74, sub-s. 1 (*b*), of the Housing of the Working Classes Act, 1890, which limits the operation of that section to "dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate," applies only where new buildings are to be erected. Alterations and additions to existing buildings may be within the Act, although the Court has never expressed an opinion that their building was not injurious to the estate.

Dwellings of a kind suitable for the working classes, but occupied at the time by persons who are not members of those classes, are not available for the working classes within the meaning of the Housing of the Working Classes Act, 1890, s. 74, sub-s. 1 (*b*). *In re* CALVERLEY'S SETTLED ESTATES - - - - Farwell J. 150

2. —— *Resettlement—Life Estate extinguished—Original Settlement subsisting—Sale by original Life Tenant—Compound Settlement—Trustees—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 4, 5; *s.* 50—*Settled Land Act*, 1890, (53 & 54 *Vict. c.* 69), *s.* 4.

A testator devised freeholds to the vendor for life, with remainders in strict settlement.

The property was subsequently disentailed, resettled, and appointed so as to extinguish the vendor's life estate, but the original settlement created by the will was still subsisting in respect of a jointure and portions charged under the powers thereof:—

Held, that the vendor could sell under the will alone, so that it was unnecessary to appoint trustees of the compound settlement created by the will and subsequent deeds.

In re Du Cane and Nettlefold's Contract, [1898] 2 Ch. 96, and *In re Mundy and Roper's Contract*, [1899] 1 Ch. 275, followed.

In re Cornwallis-West and Munro's Contract, [1903] 2 Ch. 150, distinguished. *In re* LORD WIMBORNE AND BROWNE'S CONTRACT
Swinfen Eady J. 537

3. —— *Sale by—Tenant for Life—Best Price—Undervalue — Purchaser — "Dealing in Good Faith"—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 4, *sub-s.* 1; *ss.* 53, 54.

In the case of a sale by a tenant for life under the Settled Land Act, the mere fact that the purchaser has acquired the property at an undervalue is not, by itself, sufficient to invalidate the sale. If he has acted in good faith he is protected by s. 54 of the Settled Land Act, 1882, and he is not bound to inquire whether the tenant for life or the trustees have had the property valued.

The tenant for life of a freehold public-house, which was let to a firm of brewers at a rent of 63*l.* for a term of which there were twelve years to run, sold the property, subject to the lease, for 2000*l.* Immediately after the sale the purchaser contracted to resell the property for 3000*l.* to the brewers, to whom it had previously been offered for 2750*l.* but in vain. The remainderman brought an action to set the sale aside on the ground that the best price had not been obtained. There was no evidence that the purchaser had acted otherwise than in good faith:—

Held, that he was protected by s. 54 of the Settled Land Act, 1882. HURRELL *v.* LITTLEJOHN - - - - - Joyce J. 689

—— Mortgage—Foreclosure—Successive incumbrances—Tenant for life of equity of redemption - - - - 192
See MORTGAGE. 2.

SETTLEMENT—*Cohabitation, Resumption of—Separation Deed—Settlement on Children of Marriage.*

By a separation deed the husband assigned property belonging to him to a trustee upon trusts for the wife for life, and after her death for the benefit of the existing children of the marriage. The husband and wife subsequently resumed cohabitation:—

Held, that the settlement in favour of the children was not affected by the resumption of cohabitation.

Ruffles v. *Alston*, (1875) L. R. 19 Eq. 539, followed. *In re* SPARK'S TRUSTS. SPARK *v.* MASSEY - - - Kekewich J. 451

SETTLEMENT—*continued.*

2. —— *Cohabitation, Trust for Wife during—Validity—Policy of the Law—Husband and Wife—Post-nuptial Settlement.*

By a post-nuptial settlement the husband assigned certain leaseholds to trustees upon trust to pay the rents to his wife for life, or so long as she should continue the cohabiting wife or the widow of the settlor, for her separate use, and upon the determination of the trust in favour of the wife the husband took an interest in the settled property. Some years after the date of the settlement the husband and wife separated by mutual consent, and they had not since cohabited:—

Held, that the restriction of the wife's enjoyment of the rents to the period of cohabitation was not void as against the policy of the law, and that the trust in her favour determined upon her ceasing to live with her husband.

Cartwright v. *Cartwright*, (1853) 3 D. M. & G. 982, and *H.* v. *W.*, (1857) 3 K. & J. 382, distinguished. *In re* Hope Johnstone. Hope Johnstone *v.* Hope Johnstone - **Kekewich J. 470**

3. —— *Covenant to Settle after-acquired Property—Construction—Life Interest—Annuity.*

A covenant in general terms to settle after-acquired property does not include a life interest or an annuity, in the absence of any indication in the settlement of a specific intention to include such interests.

Accordingly, where a marriage settlement contained a covenant that all real and personal property to which the wife should during her coverture become entitled, whether in possession, remainder, or otherwise, should be transferred to the trustees of the settlement upon trust for sale and conversion and to hold the proceeds upon the trusts of the settlement:—

Held, that an annuity acquired by the wife during her coverture was not caught by the covenant.

White v. *Briggs*, (1848) 22 Beav. 176, n., and *Townshend* v. *Harrowby*, (1858) 4 Jur. (N.S.) 353, followed.

Scholfield v. *Spooner*, (1884) 26 Ch. D. 94, distinguished. *In re* Dowding's Settlement Trusts. Gregory *v.* Dowding **Kekewich J. 441**

4. —— *Covenant to settle After-acquired Property—Scots Domicil—Scots Law—Jus Relictæ—Spes Successionis — Covenant of Indemnity — "Entitled to any Personal Property for any Estate or Interest whatsoever"—Husband and Wife—Marriage Settlement.*

A wife's mere spes successionis, such as her hope of succession to a share of her husband's personal property upon his death, under the Scots law of the jus relictæ (which jus vests in the wife only upon the death of the husband), even though coupled with an indemnity by the husband in damages if the spes should be disappointed, is not an "estate or interest in personal property," coming to her "during the coverture," within the meaning of the usual covenant in a marriage settlement for the settlement of the wife's after-acquired property.

Decision of Buckley J. reversed. *In re* Simpson. Simpson *v.* Simpson - - **C. A. 1**

5. —— *Legacy Duty—Right to Indemnity—Reversionary Share—Settlement of Part—Covenant for further Assurance.*

In all cases of assignment of reversionary interests the legacy duty which becomes payable on their falling into possession falls, in the absence of express contract, on the assignee.

Where the owner of a reversionary interest settles a part of it, there is no rule which throws the burden of the legacy duty upon the part retained, and a covenant for further assurance does not bind the settlor to indemnify the settled fund against legacy duty. *In re* Repington. Wodehouse *v.* Scobell - - **Farwell J. 811**

—— "Alimentary provision"—Validity of restriction as against husband's mortgagees - - - - **573**
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—— Compound settlement—Sale—Trustees.
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—— Settlement estate duty — Testamentary expenses—Direction to pay - **363**
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SOLICITING—Old customers—Sale of business.
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SOLICITOR — *Costs — Taxation — Collection of Rents—Commission.*

In the absence of a special agreement, solicitors cannot charge a lump sum by way of commission for the collection of rents in their bill of costs, as if the work is professional, items must be delivered, and if non-professional, it cannot be charged in the bill.. *In re* Shilson, Coode & Co. - - **Swinfen Eady J. 837**

—— Lien on client's documents—Waiver—Proof of debt—Amendment—"Inadvertence"
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—— —— s. 21 - - - - 317
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1 & 2 Vict. c. 110, s. 13—*Judgments* - 658
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1856.

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1857.

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25 & 26 Vict. c. 89, ss. 8, 12—*Companies* 87
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1867.

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TRADE-MARK—*Registration—Invented Word—"Absorbine"—Patents, Designs, and Trade Marks Acts*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *and* 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 1.

The word "Absorbine," as applied to a veterinary preparation for absorbing and removing swellings, is not an "invented word" capable of registration as a trade-mark. CHRISTY *v.* TIPPER - - - - **Joyce J. 696**

2. —— *Registration—Motion to rectify—Fancy Word—"Tabloid"—Presumption arising from Long User—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64.

Where a trade-mark is impeached after it has been on the register for a great many years, and has been openly and largely used, and there is a doubt as to its validity, the registered proprietor is entitled to the benefit of the doubt.

Prior to 1884 B. & W. manufactured and sold

TRADE-MARK—*continued.*
compressed drugs made up into small biconvex discs under the name of "Tablets," and they registered that word as a trade-mark. In 1884 they registered the newly coined word "Tabloid" as a trade-mark, under the Patents, Designs, and Trade Marks Act, 1883, for substances used in pharmacy, and they had since manufactured and sold compressed drugs of the same shape and size under the name of "Tabloids":—
Held, by Byrne J. and by the Court of Appeal, dubitante Stirling L.J., that at the date of its registration the word "Tabloid" was a distinctive fancy word. WELLCOME (TRADING AS BURROUGHS, WELLCOME & Co.) *v.* THOMPSON & CAPPER. *In re* BURROUGHS, WELLCOME & Co.'s TRADE-MARKS
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—— Mortgage security—No legal transfer of security — Dissolution of company — Vesting order - - - 147
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—— Shares—Non-registration—"Default or unnecessary delay" - - - 598
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—— Shares — Refusal to register — "Usual common form"—Address of transferor
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TRUST—Precatory—Absolute gift "in confidence" - - - - 415
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TRUSTEE—*Neglect to account—Originating Summons — Costs — Costs of taking and vouching Account—Practice—Administration.*
In a case where proceedings for administration are rendered necessary by the gross and indefensible neglect of trustees to deliver accounts, the defaulting trustees may be ordered to pay all the costs, including the costs of taking and vouching the accounts. Such an order may be made in proceedings commenced by originating summons.
Hewett v. *Foster*, (1844) 7 Beav. 348; 64 R. R. 98, held not to represent the modern practice. *In re* SKINNER. COOPER *v.* SKINNER
Farwell J. 289

—— Executor.
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VENDOR AND PURCHASER—*Judgment for Specific Performance with Costs — Subsequent Failure by Purchaser to comply with Judgment—Vendor's Motion to rescind Contract—Form of Order—Costs—Practice.*
Form of order in a vendor's action where judgment for specific performance with costs has been obtained and, the purchaser having subsequently failed to comply with the judgment, the vendor moves to rescind the contract and to stay further proceedings except for recovery of the costs of the action and motion. OLDE *v.* OLDE - - - - Farwell J. 35

2. —— *Mortgage—Married Woman Mortgagee—Joint Account Clause—Transfer of Mortgage—Concurrence of Husband—Separate Acknowledgment.*
Since the Married Women's Property Act, 1882, when two or more persons, one of whom is a married woman, advance moneys by way of mortgage, under a recital that the advance is made out of moneys belonging to them on a joint account, it is not necessary on a transfer of the mortgage either for the husband of the married woman to concur in the conveyance or for her to acknowledge it separately under the Fines and Recoveries Act.
In re Brooke and Fremlin's Contract, [1898] 1 Ch. 647, followed. *In re* WEST AND HARDY'S CONTRACT - - - Farwell J. 145

3. —— *Outgoings — Charge of Expenses on Frontager's Premises—Date from which Charge takes Effect—"Completion of Works"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257 *—Street—Paving Expenses.*
The expenses incurred by a local authority, under the Public Health Act, 1875, in the execution of paving and other works required to be done by s. 150, first become "a charge on the

VENDOR AND PURCHASER—*continued.*
premises in respect of which they were incurred" within the meaning of s. 257 from the date of the completion of the works.

Observations of North J. in *In re Bettesworth and Richer*, (1888) 37 Ch. D. 535, and of the Court of Appeal in *Stock* v. *Meakin*, [1900] 1 Ch. 683, at p. 691, discussed and applied. *In re* Allen and Driscoll's Contract **Byrne J. 493**

4. —— *Receiver — Real Estate — Purchaser's Interest in Land—Judgment Creditor of Purchaser — Equitable Execution — Receiver — Notice to Vendor—Rescission of Contract on Money Payment to Purchaser—Secured Creditor—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 13.

In June, 1901, the purchaser under a contract for the sale of land paid a deposit and was let into possession. The purchaser did not complete, and litigation ensued between him and the vendor. In August, 1902, a judgment creditor of the purchaser obtained by way of equitable execution an order appointing himself, upon giving security, receiver of the purchaser's interest in the land under the contract for sale, and at once gave notice of this order to the vendor, but did not perfect his security as receiver until May, 1903. In the meantime, in January, 1903, the purchaser being unable to complete, the litigation between him and the vendor was, without notice to the judgment creditor, compromised by the contract for sale being rescinded and the vendor paying the purchaser 110*l.*, not in part repayment of the deposit, but to give up possession of the property:—

Held, that under the circumstances the vendor was not a trustee for the purchaser of the land comprised in the contract, and that the purchaser's interest under the contract was not such an interest in land as that the receivership order operated as a charge upon it:

Held, also, that as the judgment creditor did not perfect his security as receiver until after the compromise, he had no claim against the vendor in respect of the 110*l.*

Semble, the result would have been the same even if the 110*l.* had been given in part repayment of the deposit. Ridout *v.* Fowler **Farwell J. 658**

5. —— *Rents—Vendor in Possession and receiving Rents after Date for Completion—Arrears of Rent previously Due.*

Where completion of a purchase is delayed, without any fault on the part of the purchaser, and the vendor remains in possession and receives rents after the date fixed by the contract for completion, the vendor is not at liberty, as against the purchaser, to retain out of the rents so received arrears of rent accrued due at the date of the contract, or subsequently before the date fixed for completion. Plews *v.* Samuel **Kekewich J. 464**

—— Lien for unpaid purchase-money, Liability of next of kin to discharge—Rent-charge issuing out of leaseholds—Intestacy **726**
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—— No legal transfer of security—Dissolution of company - - - - **147**
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—— School district, Dissolution of—Property of dissolved district - - - **664**
See Poor Law.

VIBRATION—Nuisance—Noise—Electric generating station - - - **707**
See Nuisance. 2.

WAIVER—Solicitor—Lien on client's documents—Proof of debt—Amendment—"Inadvertence" - - - - **226**
See Company. 18.

WIFE.
See under Husband and Wife.

WILL—*Advancement—Hotchpot—Appointment.*

The testator by his will left his residuary estate upon trust for his wife for life, and gave her power to appoint the funds amongst their four children. In default of appointment the children were to take equally. Any child who had received any part of the funds under any appointment was, in default of appointment to the contrary, to bring the appointed funds into hotchpot. The will also contained an advancement clause. After the testator's death 705*l.* was advanced to R., one of the children. The widow subsequently by her will appointed one equal fourth part of the property of which she was tenant for life to each of two of her children absolutely, and one equal fourth part upon trust for each of her other children (of whom R. was one) respectively for life, with remainder to their respective children. The testatrix did not in her will make any reference to the advance to R.:—

Held, that R. was not liable to bring into hotchpot or account for the 705*l.* advanced to him out of his expectant share. *In re* Fox. Wodehouse *v.* Fox - - **Byrne J. 480**

2. —— *Alteration, Unattested—Confirmation by Codicil—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 21.

A testatrix by her will, dated February 1, 1901, gave many legacies, including legacies (*a*) 200*l.* to C., (*b*) 500*l.* to M., and (*c*) 3000*l.* to S.

On October 19 her servant, by her direction, struck out the three legacies. On October 21, 1901, testatrix executed a codicil referring to her will as of February 1, 1901, and thereby revoked legacy (*b*), but did not refer to the other two legacies, and concluded by ratifying and confirming the will in other respects.

Held, that only legacy (*b*) was revoked. *In re* Hay. Kerr *v.* Stinnear - **Buckley J. 317**

3. —— *Attesting Witness—Devise to Daughter or her Children—Attestation by Husband—Intestacy—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 15.

Sect. 15 of the Wills Act, though avoiding (inter alia) a devise to the wife of an attesting witness, quoad her interest, does not strike the devise out of the will. The will must therefore be construed before s. 15 is applied.

General devise after the death of testator's

WILL—*continued.*

wife to his daughter or her children. The daughter, whose husband attested the will, survived the wife and had children:—

Held, an intestacy.

In re Townsend's Estate, (1886) 34 Ch. D. 357, followed.

Jull v. *Jacobs*, (1876) 3 Ch. D. 703, and *In re Clark*, (1885) 31 Ch. D. 72, explained and distinguished. APLIN *v.* STONE **Swinfen Eady J. 543**

4. —— *"Chattel Real"—General Bequest—Exception—Specific Bequest of excepted Property—Failure by Death of Specific Legatee—Rent-charge issuing out of Leaseholds—Vendor's Lien for unpaid Purchase-money—Intestacy—Liability of Next of Kin to discharge Lien—Will—Construction—Real Estate Charges Acts*, 1854 (*Locke King's Act*, 17 & 18 *Vict. c.* 113), *s.* 1; 1867 (30 & 31 *Vict. c.* 69), *s.* 2; 1877 (40 & 41 *Vict. c.* 34), *s.* 1.

A testator by his will, made in 1886, bequeathed all his personal estate, except what he otherwise disposed of by his will or any codicil thereto, and except chattels real, to trustees, upon the trusts therein mentioned. And he devised and bequeathed "all real estate and chattels real in England to which I may be entitled at my death, except what I have otherwise disposed of by this my will," to his brother absolutely for all his estate and interest therein.

The testator made seven codicils to his will, the last of which was made in July, 1898. In that codicil he stated that his brother was dead, but he did not revoke the bequest to him, or the general bequest of personalty, though he made some alterations in his will and the previous codicils. In other respects the testator confirmed his will as altered by the prior codicils.

In April, 1898, the testator entered into a contract for the purchase of a rent-charge issuing out of leasehold property in England. The testator died in August, 1898. At that time the contract had not been completed:—

Held, that, inasmuch as the will and codicils must be read together, and the will treated as if made at the date of the last codicil, it could not be taken that the testator had excepted chattels real from the general bequest merely for the purpose of giving them to his brother, but that they were excepted for all purposes, and that consequently there was an intestacy as to the chattels real, and they did not fall into the general bequest:

Held, also, that the rent-charge was a chattel real, and that the testator's next of kin were liable under the Real Estate Charges Acts, 1854, 1867, and 1877 to discharge the vendor's lien for unpaid purchase-money.

Decision of Byrne J., [1904] 1 Ch. 111, affirmed. *In re* FRASER. LOWTHER *v.* FRASER **C. A. 726**

5. —— *Forfeiture—National School—Trust for Endowment—Control of School Board—Non-provided School—Education Authority—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 1, 5, 6 *sub-s.* 2, 7 *sub-s.* 1 (*d*), 13.

A testator who died in 1891 bequeathed investments to trustees upon trust to apply the income towards the annual expenses of a National School so long as it was "supported by voluntary subscriptions as now and heretofore in addition to the Government grant," with a gift over in the event of the said school "ceasing to be so supported or becoming subject to the control of a school board." Since the death of the testator the necessity for subscriptions had practically ceased owing to the bequest, but the managers were in debt to a small extent. In consequence of the passing of the Education Act, 1902, the school, as a public elementary school, came under the control of the county council as the education authority:—

Held, that there had been no forfeiture on either of the grounds mentioned by the testator, and that the gift over did not take effect. *In re* BEARD'S TRUSTS. BUTLIN *v.* HARRIS **Byrne J. 270**

6. —— *Forfeiture Clause—Words of Futurity—Limitation to Events after Testator's Death—Forbidden Marriages—Construction of Will.*

The rule recognised in *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, that a forfeiture clause in a will, providing that, in the event of alienation by or the bankruptcy of a legatee, his interest under the will "shall thenceforth cease and determine," applies to acts of forfeiture after the date of the will in the testator's lifetime as well as to acts after his death, ought not to be applied to any but those particular acts of forfeiture, and ought not, in the absence of express words, to be extended to other acts of forfeiture, e.g., a marriage of a kind forbidden by the testator.

Though primâ facie words of futurity in a will point to events happening after the execution of the will, and not merely to events happening after the testator's death, that primâ facie meaning may be controlled by the context.

A testator by his will gave benefits to his sons and daughters, and declared that "if any son or daughter shall" alienate his or her interest or become bankrupt, or "shall contract any marriage forbidden by me," then and in any such case "his or her share . . . . shall thenceforth cease and determine." The testator declared that "the marriages forbidden by me are in the case of a son or daughter marrying with a person of any degree of kindred, unless more remote than third cousin, and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will."

After the date of the will and during the lifetime of the testator one of his daughters married her first cousin:—

Held (by Vaughan Williams and Stirling L.JJ., Cozens-Hardy L.J. dissenting), that, as regarded the forbidden marriages, the will shewed an intention that forfeiture should take effect only in the case of a marriage after the testator's death, and that consequently the daughter had not forfeited her interest.

Decision of Kekewich J. reversed. *In re* CHAPMAN. PERKINS *v.* CHAPMAN **C. A. 431**

7. —— *Forfeiture on Alienation—Life Interest—Charge—Cancellation of Charge before Property charged becomes payable.*

Under the will of his father, Henry Baker was entitled to a life interest in a share of

WILL—*continued.*

residue. The will contained a proviso that he should not have power to dispose of his interest by way of anticipation, and that in the event of his becoming bankrupt or doing anything whereby his share or some part thereof would become payable to or vested in some other person it should go over to his children.

The testator died in 1896, and an order for the administration of his estate was made in 1899. In 1903 Henry borrowed two sums of money, and signed in favour of the lender's charges upon his interest in his father's estate. Both charges were cancelled and given up to him in July before any order on further consideration had been made in the action or anything had become payable to him in respect of his life estate:—

Held, that a forfeiture had been incurred, and the fact that the mortgagees released the charges before the estate was distributed was immaterial. *In re* BAKER. BAKER *v.* BAKER Buckley J. 157

8. —— *Investment Clause — "Securities" — Primary Meaning—Secondary Meaning—Context — Stocks and Shares in Companies — Extrinsic Evidence, Admissibility of—Construction of Will.*

A general broker, who died in 1896, by his will made in 1895, after bequeathing a trust legacy, declared that "all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit: and I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities":—

Held (reversing the decision of Farwell J.), that the context was sufficient to shew that "securities" meant "investments" and included stocks and shares in railway and other companies.

The admissibility of extrinsic evidence to ascertain the true sense and meaning of doubtful expressions in a will, discussed and considered.

Whether at the present day the word "securities" in a legal document, in the absence of context, includes stocks and shares as well as mortgages on land or other property, *quære*.

Ogle v. *Knipe*, (1869) L. R. 8 Eq. 434, considered. *In re* RAYNER. RAYNER *v.* RAYNER C. A. 176

9. —— *Marriage with Consent—Consent given —Power of Retractation—Construction of Will.*

A person in loco parentis is justified in altering his mind and withdrawing his consent to a marriage, if circumstances subsequently come to his knowledge which, had they been known at the time, would have caused him originally to withhold his consent. This power of retractation, however, is not unlimited, and cannot be exercised for mere caprice or without just and exceptional reasons.

Merry v. *Ryves*, (1757) 1 Eden, 1, and *Dashwood* v. *Lord Bulkeley*, (1804) 10 Ves. 230, discussed and applied.

By a codicil made in 1891 a testator directed that, in the event of his daughter marrying against her mother's wish, a legacy of 500*l.* and her share in his residuary estate were to be settled on the daughter for life, with remainder to her children. In May, 1893, the daughter

WILL—*continued.*

became engaged with the consent of the testator and his wife, conditionally on the marriage being deferred for two years. In February, 1895, the testator died; the engagement was still recognised by the widow, who stipulated for a further delay till August. To this the daughter agreed. Subsequently there were disputes between the mother and daughter as to the form of the settlement and other matters; the daughter left her mother's house and was married in June. Immediately before the marriage the mother wrote withdrawing her consent to the marriage:—

Held, that under the circumstances the consent originally given could not be withdrawn, and that the daughter was absolutely entitled to the legacy and to her share in the testator's residuary estate. *In re* BROWN. INGALL *v.* BROWN Byrne J. 120

10. —— *Name and Arms Clause—"Lawfully assume"—Impossible Condition—Condition Subsequent—Construction of Will.*

A testator, who had assumed the name and arms of C. without any colour of right thereto, devised an estate to persons in succession, and directed that every person who should become entitled, and who should not bear "his" (the testator's) surname of C. and "his" coat of arms, should, within twelve months after so becoming entitled, "lawfully assume" such name and arms, and that in default of compliance the estate should go over. The devisee first in succession, who was a son of the testator, took the name of C., but did not, within the time limited, assume the arms of C., because it appeared that it was impossible for him, under the circumstances, to obtain a grant of the arms of C. from the College of Arms or by Royal licence:—

Held, that the testator, using the words "lawfully assume," must have meant something more than a mere voluntary assumption; that in order to comply with the condition it was necessary for the devisee to obtain a proper grant of arms from the College of Arms or by Royal licence; and that as this could not be done, the condition was impossible, and, being a condition subsequent, was not binding on the devisee. *In re* CROXON. CROXON *v.* FERRERS - - Kekewich J. 252

11. —— *Power given to "my said Trustees"— Power whether Personal or annexed to the Office— Construction of Will.*

A testator appointed his wife M., his brother C., and his friend R. executors and trustees of his will, and gave to "my said trustees" all his estate upon trust for his wife for life, "with full power to my said trustees" to sell the whole or any part of his estate and apply the proceeds for the benefit of his wife during her life:—

Held, that the power was not personal to the trustee originally named, but was annexed to the office and could be exercised by the trustees or trustee for the time being.

The general principle laid down by the Master of the Rolls (Sir W. Grant) in *Cole* v. *Wade*, (1807) 16 Ves. 27, 44; 10 R. R. 129, 135, that "wherever a power is of a kind, that indicates a personal confidence, it must primâ facie, be understood to be confined to the individual, to whom it

WILL—*continued.*

is given; and will not except by express words pass to others, to whom by legal transmission the same character may happen to belong," dissented from as being inconsistent with the principle of the decision of the Court of Appeal in *Crawford* v. *Forshaw*, [1891] 2 Ch. 261. *In re* SMITH. EASTICK *v.* SMITH - - Farwell J. 139

12. —— *Precatory Trust—Gift Beneficial or in Trust—Absolute Gift "in Confidence"—Gift over in Default of Disposition by Will of Absolute Donee—Validity—Construction of Will.*

A testator gave, bequeathed, and devised to his wife "the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and, in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces."

The testator left his wife and seven nieces surviving him. He had had no children:—

Held (by Vaughan Williams and Stirling L.JJ., Cozens-Hardy L.J. dissenting), that the widow took the property absolutely for her own benefit, and that no trust was created in favour of the nieces.

Decision of Kekewich J. affirmed.

The use by a testator of the words "in confidence" in connection with an absolute gift is not of itself sufficient to create a trust.

Held, that the gift over in default of any disposition of the property by the widow by her will was repugnant to the prior absolute gift to her, and was therefore invalid.

Held, that the word "such" ought not to be implied before the word "disposition."

Per Cozens-Hardy L.J.: Upon the construction of the will as a whole the widow took more than a life interest, and in case all the nieces should predecease her, her absolute interest would remain. But the intention of the testator was that the nieces, if any, who should survive the widow, should take the property in such shares as she should by her will determine, and that, in default of any such disposition by her, the surviving nieces should take the property in equal shares, and effect ought to be given to that intention. The words "in default of any disposition by her thereof by her will," taken in connection with the context, necessarily required the insertion of the word "such" before "disposition." *In re* HANBURY. HANBURY *v.* FISHER C. A. 415

13. —— *Precatory Trust—"I desire"—Construction of Will.*

A testatrix gave all her property equally amongst her two daughters "as tenants in common for their own absolute use and benefit," and appointed them her executrixes. She then added, "My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes

WILL—*continued.*

of my said two daughters accruing from the moneys and investments under this my will":—

Held, that no trust was created in favour of the son.

The principles stated in *In re Williams*, [1897] 2 Ch. 12, 18, 29, upon which equitable obligations by way of trusts or conditions are or are not to be inferred from the language of a will, applied. *In re* OLDFIELD. OLDFIELD *v.* OLDFIELD. C. A. 549

14. —— *Testamentary Expenses—Direction to pay—Settlement Estate Duty—Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-s.* 1.

Settlement estate duty on personalty is not a testamentary expense, although the executor is accountable for it.

It is therefore payable out of the settled property under the Finance Act, 1896, s. 19, sub-s. 1, notwithstanding a direction in the will to pay testamentary expenses out of residue. *In re* KING. TRAVERS *v.* KELLY Swinfen Eady J. 363

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